Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT MARTINEZ, ET AL.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state statute that defies the congressional intent behind 8 U.S.C. § 1623 by providing resident tuition rates at public postsecondary institutions to illegal aliens and declaring that it is granting those benefits to illegal aliens not on the basis of "residence" in the state, but on the basis of attending a high school in the state, is expressly preempted.

2. Whether a court must undertake conflict preemption analysis after concluding that an express preemption provision does not apply in a case involving both types of preemption claims.

PARTIES TO THE PROCEEDING BELOW

In the California Supreme Court, Plaintiffs and Appellants were Robert Martinez, Cory McMahon, Onson Luong, Scott Nass, Justin Rabie, Mark Hammes, Steven Hammes, David Hammes, Ash Caloustian, Aaron Dallek, Soleil Teubner, Mara McDermott, Adam Anderson, Demyan Drury, Casey Meguro, Chaning Jang, Kyle Dozeman, Kellan Didier, James Deutsch, Patrick Bilbray, Briana Bilbray, Brian Bilbray, Cory Robertson, Daniel Alameda, Dan Goldberg, Tim Kozono, Joseph Konrad, David Taylor, Suzanne Kattija-Ari, Justine Smith, Amanda Hildebrand, Aaron Malone-Stratton, Pamela Stratton, Michal Bulmash, Jimmy DaVault, III, Matt Bittner, Antwann Davis, Arrington Dennison, Kathryn Jelsma, Emily Grant, Peter Shea, and Adam Thomson.

Defendants and Respondents were Regents of the University of California, Trustees of the California State University System, Board of Governors of the California Community Colleges, Robert C. Dynes, Charles B. Reed, and Marshall Drummond.

Amici supporting Plaintiffs and Appellants below were Eagle Forum Education & Legal Defense Fund; United States Representatives Lamar Smith and Steve King, and Washington Legal Foundation and Allied Educational Foundation; and Pacific Legal Foundation.

PARTIES TO THE PROCEEDING BELOW – Continued

Amici supporting Defendants and Respondents below were Californians Together, The Association of Mexican American Educators and the California Association for Bilingual Education; Asian Pacific American Legal Center and 80 Asian Pacific American organizations; Los Angeles Community College District; San Jose/Evergreen Community College District; Orange County Dream Team; Alicia A., Gloria A., Marcos A., Mildred A., Enrique Boca, Nicole Doe, Collin Campbell, Alex Ortiz, Linda Lin Qian, Cesar Rivadeneyra, Jennifer Seidenberg, Improving Dreams, Equality, Access and Success at University of California, Davis, Improving Dreams, Equality, Access and Success of University of California, Los Angeles, and National Immigration Law Center; San Diego Community College District; New York State Youth Leadership Council, The New York State Association for Bilingual Education, New York Latino Research and Resources Network, New York Immigration Coalition, Long Island Immigrant Alliance, Northern Manhattan Coalition for Immigrant Rights, Hispanic Resource Center of Larchmont and Mamaroneck, Hispanic Federation, Committee for Hispanic Children & Families, Hispanic Association of Colleges and Universities, Hispanic College Fund, Hispanic National Bar Association, Asian American Legal Defense & Education, Professional Staff Congress, California Faculty Association, Dr. Pedro Caban, Dr. Marcelo Suarez-Orozco, Dr. Carola Suárez-Orozco, Dr. Regina Cortina, Catherine J. Crowley and Dr. Kevin Dougherty; American

PARTIES TO THE PROCEEDING BELOW – Continued

Civil Liberties Union, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, American Civil Liberties Union of San Diego and Imperial Counties, and the National Immigration Law Center; and Peralta Community College District.

RULE 29.6 STATEMENT

The Immigration Reform Law Institute is a nonprofit organization, exempt from federal taxation under Internal Revenue Code Section 501(c)(3), based in Washington, D.C. working exclusively to protect the legal rights, privileges, and property of United States citizens and their communities from injuries and damages caused by unlawful immigration. It has no stockholders and no parent company; it is a supporting organization under Internal Revenue Code § 509(a)(3) to another § 501(c)(3) organization: the Federation for American Immigration Reform.

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OPINIONS BELOW

The Opinion in the Yolo County Superior Court of California is unpublished and reproduced below at App. 110-123. The Opinion of the Court of Appeal for the Third Appellate District of California is partially published and reproduced below at App. 38-109. The Opinion of the California Supreme Court is published and reproduced below at App. 1-37.

JURISDICTION

The judgment of the California Supreme Court, reversing the judgment of the California Court of Appeal for the Third Appellate District, was entered on November 15, 2010. This Court possesses jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Statutory Provisions

8 U.S.C. § 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits

(a) In general. Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a state (or a political subdivision) for

any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1621. Aliens who are not qualified aliens or nonimmigrants ineligible for State and local benefits

(a) In general. Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not –

(1) a qualified alien (as defined in section 431 [8 USCS § 1641]),

(2) a nonimmigrant under the Immigration and Nationality Act, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 USCS § 1182(d)(5)] for less than one year,

is not eligible for any state or local public benefit (as defined in subsection (c)).

8 U.S.C. § 1601. Statements of national policy concerning welfare and immigration

The Congress makes the following statements concerning national policy with respect to welfare and immigration:

* * *

(2) It continues to be the immigration policy of the United States that –

(A) aliens with the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and

(B) the availability of public benefits not constitute an incentive for immigration to the United States.

* * *

(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.

State Statutes

Cal. Ed. Code. § 68130.5. Requirements for exemption from nonresident tuition

Notwithstanding any other provision of law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges;

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

* * *

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

INTRODUCTION

This case involves a question of great national importance: whether a state may defy Congress's clear statutory prohibition against providing in-state (or "resident") tuition rates to illegal aliens unless the state also provides the same benefit to all United States citizens regardless of their states of residence. In the absence of guidance from this Court, numerous states have circumvented federal law in this area with impunity. They have done so by urging a reading of federal law that reduces it to a dead letter and is contrary to every expression of congressional intent on the matter.

In 1996, as part of the Illegal Immigration and Immigrant Responsibility Act, P.L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996) ("IIRIRA"), Congress enacted a variety of measures to discourage illegal immigration and strengthen the enforcement of federal immigration laws. One of the provisions of that Act, codified at 8 U.S.C. § 1623, is a one-sentence prohibition that

forbids a state from providing resident tuition rates to any illegal alien unless that state provides resident tuition rates to all United States citizens, regardless of their states of residence:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1623.

This congressional bar did not sit well with state legislators in a handful of states who disagreed with federal immigration policy and wanted to make in-state tuition rates at their public postsecondary institutions available to illegal aliens. One of the first states to do so was California. Indeed, some California public universities had been providing in-state tuition rates to illegal aliens without express statutory authorization as early as 1985.[1]

Four years after IIRIRA was enacted, the California legislature passed a bill providing in-state tuition rates to certain illegal aliens. *See* A.B. 1197,

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[1] *See* David Holley, *Decades of Doubt: Law's New "Registry" Date can End Uncertainty for Longtime Illegal Aliens*, L.A. TIMES, Mar. 2, 1987, at 3.

1999-2000 Leg., Reg. Sess. (Cal. 2000). However, Governor Gray Davis vetoed the bill, stating that 8 U.S.C. § 1623 "would require that all out-of-state legal residents be eligible for this same benefit" and that providing the benefit to all United States citizens attending California public colleges and universities would cost the state too much money.[2] The following legislative session, the California legislature passed virtually the same bill again.[3] On October 12, 2001, Governor Davis signed the bill into law, without explaining why his concerns regarding 8 U.S.C. § 1623 no longer applied.[4] The law is codified at California Education Code § 68130.5.

Concerned with the conflict between 8 U.S.C. § 1623 and Cal. Ed. Code § 68130.5, the California

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[2] Governor's veto message to Assembly on Assembly Bill No. 1197 (1999-2000 Reg. Sess.) (Sept. 29, 2000). *See* App. 15 [pages 8-9 of Ca. Sup. Ct. slip opinion].

[3] The second bill was A.B. 540, 2001-2002 Leg., Reg. Sess. (Cal. 2001) (which became Cal. Ed. Code § 68130.5). It differed from A.B. 1197 in two minor respects: (1) A.B. 1197 required beneficiaries to enroll at a California postsecondary institution within one year of graduation, whereas A.B. 540 allowed beneficiaries to enroll at anytime, and (2) an illegal alien beneficiary of A.B. 1197 had to present evidence that an "application" for lawful status had been initiated, whereas an A.B. 540 beneficiary only had to sign an affidavit expressing an intent to apply for lawful status if and when such application ever became possible.

[4] The bill number was A.B. 540. For a full account of the legislative history of Cal. Ed. Code § 68130.5 and similar laws in other states, *see* Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. OF LEGIS. AND PUBLIC POLICY, 473, 478-496 (2007).

legislature then attempted to immunize itself from liability by enacting Cal. Ed. Code § 68130.7, which provides,

> If a state court finds that Section 68130.5 . . . is unlawful, the court may order, as equitable relief, that the administering entity that is the subject of the lawsuit may terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or any other retroactive relief, may be awarded.

California is not the only state that has defied the express requirements of 8 U.S.C. § 1623 and provided in-state tuition rates to illegal aliens. Since 2001, nine other states have done so.[5] Action by this Court is needed to ensure that more states do not follow California's policy of calculated defiance and thwart Congress's intent to deny residence-based postsecondary education benefits to illegal aliens.

The debate over whether illegal aliens should receive the public benefit of resident tuition rates is a matter of intense national interest and controversy. Nearly every year since 2001, advocates of resident tuition benefits for illegal aliens have proposed in Congress the so-called "Development, Relief and Education

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[5] *See* 110 Ill. Comp. Stat. Ann. § 305/7e-5; K.S.A. § 76-731a; Neb. Rev. Stat. § 85-502; N.M. Stat. Ann. § 21-1-4.6; N.Y. Educ. Law § 6301.5; Tex. Educ. Code Ann. §§ 54.052-54.053; Utah Code Ann. § 53B-8-106; Wash. Rev. Code Ann. § 28B.15.012. Oklahoma has repealed its in-state tuition provision. *See* 70 Okl. Stat. §§ 3242, 3242.2.

for Alien Minors (DREAM) Act," which would repeal 8 U.S.C. § 1623.[6] To date, none of these attempts to repeal 8 U.S.C. § 1623 have succeeded. However, their failure to change federal law has not dissuaded some state legislatures from taking an alternative path: simply circumventing federal law.

STATEMENT OF THE CASE

This case is a challenge to Cal. Ed. Code § 68130.5, which provides the benefit of in-state (or "resident") tuition rates to certain illegal aliens.

[6] DREAM Act of 2010, S. 3827 (111th Congress), § 3, 156 Cong. Rec. S3827, S7353-61 (daily ed. Sep. 22, 2010); DREAM Act of 2010, S. 729 (111th Congress), § 3, 155 Cong. Rec. S3930-2 (daily ed. Mar. 26, 2009); American Dream Act, H.R. 1751 (111th Congress), § 3, 155 Cong. Rec. E797 (daily ed. Mar. 26, 2009); Comprehensive Immigration Reform Act of 2010, S. 3992 (111th Congress), § 533, 156 Cong. Rec. S8301-4, S8668 (daily ed. Nov. 30, 2010, introduced) (daily ed. Dec. 9, 2010, failed cloture vote); DREAM Act of 2009, S. 729 (111th Congress), § 3, 155 Cong. Rec. S3930 (daily ed. Mar. 26, 2009); DREAM Act of 2007, S. 1639 (110th Congress), § 616, 153 Cong. Rec. S8641-2 (daily ed. June 28, 2007); Comprehensive Immigration Reform Act of 2007, S. 1348 (110th Congress) §§ 621-632 (2007) (as amended by S.A. 1150 §§ 612-619, 153 Cong. Rec. S6007-8 (daily ed. May 11, 2007); American Dream Act, H.R. 1275 (110th Congress), § 3, 153 Cong. Rec. H2118 (daily ed. Mar. 1, 2007); Comprehensive Immigration Reform Act of 2006, S. 2611 (109th Congress) § 623, 152 Cong. Rec. S4530-4549, S5189-90 (daily ed. Apr. 7, 2006); DREAM Act of 2005, S. 2075 (109th Congress), § 3, 150 Cong. Rec. S1291 (daily ed. Feb. 12, 2004) (passed Senate but not taken up in the House); DREAM Act, S. 1545 (108th Congress), § 3, 149 Cong. Rec. 20551-2 (July 31, 2003); DREAM Act, S. 1291 (107th Congress), § 2, 147 Cong. Rec. 15361-2 (Aug. 1, 2001).

Approximately 25,000 illegal aliens in California receive this taxpayer-subsidized tuition rate every year, while the same tuition benefit is denied to tens of thousands of United States citizens who attend California public postsecondary institutions as nonresidents. *See* App. 77. The cost of this benefit to California taxpayers is immense. California spends in excess of $208 million each year subsidizing the tuition of illegal aliens under § 68130.5.[7]

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[7] This cost estimate was provided to the courts below and was derived by using the resident and nonresident tuition rates from the 2008-09 academic year at the schools in the University of California, California State, and California Community College systems and the number of illegal aliens benefiting under Cal. Ed. Code § 68130.5. For the UC system, undergraduate tuition and fees for in-state students totaled $8,383 a year, compared to $28,003 for nonresidents. http://registrar.berkeley.edu/Registration/feesched.html#undergrad. The taxpayer-subsidized portion of in-state tuition roughly equals the difference between the tuition amounts ($19,620). The number of illegal aliens enrolled system-wide (430) was multiplied by $19,620 to reach an $8,436,600 subsidy a year for the UC system. In the California State University system, the difference between the tuition amounts for resident and nonresident tuition payers was approximately $11,000 per year. Joyce Howard Price, *Students Sue for Tuition Parity with California Illegals*, WASH. TIMES (Dec. 15, 2005), p. A3. Using CSU's estimate of 10,000 illegal aliens receiving in-state tuition rates through § 68130.5, the total subsidy was $110,000,000 per year. In the community college system of California, the average tuition differential was approximately $6,000 a year. *Id.* Multiplying this figure by the number of illegal aliens receiving the subsidy (15,000) yielded a system-wide subsidy of $90,000,000. Thus, the total taxpayer subsidy in the three systems combined was approximately $208,436,600 for the 2008-09 academic year.

Petitioners challenging § 68130.5 are class representatives of the United States citizen students at California postsecondary educational institutions who are denied resident tuition rates and are instead required to pay out-of-state (or "nonresident") tuition prices to attend college. App. 7. The benefit of resident tuition rates is among the most valuable of all public benefits bestowed by the state of California. For example, the difference between resident and nonresident tuition rates for undergraduates at the University of California at Berkley is $11,439.50 per semester, resulting in a total benefit of $91,422 per student over the course of four years of study.[8]

The central issue in the express preemption aspect of this case is whether Congress intended the phrase "on the basis of residence" in 8 U.S.C. § 1623 to describe the criterion on which the benefit is bestowed (thereby allowing a state to circumvent the prohibition on resident tuition for illegal aliens by simply choosing a proxy criterion) or whether Congress was instead intending to describe the *kinds* of benefits that are typically given "on the basis of residence."

Cal. Ed. Code § 68130.5 grants illegal aliens an "exemption" from paying nonresident tuition to public postsecondary institutions, provided that they have

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[8] The cost of resident tuition is $6,230.75 per semester and the cost of nonresident tuition is $17,670.25 per semester. http://registrar.berkeley.edu/Registration/feesched.html

attended a California high school for three years and have satisfied certain other criteria to qualify for that benefit.[9] Some United States citizens can qualify for this benefit as well, if they attend a California high school for three years and graduate from a California high school. App. 18. The exact number of United States citizens receiving the benefit of Cal. Ed. Code was not established in the court proceedings below. However, Petitioners maintained that regardless of how many United States citizens are permitted to receive the benefit, Cal. Ed. Code § 68130.5 fails to meet the requirement of 8 U.S.C. § 1623 that *every* United States citizen be afforded the "benefit" (not merely an opportunity to qualify for the benefit) if a single illegal alien is provided the benefit.

The California Supreme Court held that Cal. Ed. Code § 68130.5 escaped express preemption under 8 U.S.C. §§ 1621 and 1623. App. 6, 17-29. After disposing of Petitioners' express preemption claims, the California Supreme Court declined to directly address the several conflict preemption claims in the case, as described below. App. 30-31; *see infra* at 28-36.

The second question presented for this Court's review is whether the California Supreme Court has contradicted the precedents of this Court which hold that a reviewing court must still consider conflict

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[9] The criteria include attending a California high school for three years, graduating from a California high school, and submitting an affidavit stating that the illegal alien will attempt to become lawfully present in the United States as soon as he or she possibly can. Cal. Ed. Code § 68130.5.

preemption challenges to a law even if it concludes that express preemption does not apply.

PROCEDURAL HISTORY

On, December 14, 2005, Petitioners filed a Complaint in the Yolo County, California, Superior Court alleging that Cal. Ed. Code § 68130.5 is expressly preempted, field preempted, conflict preempted, and preempted as a regulation of immigration. Petitioners claimed that Cal. Ed. Code § 68130.5 was not only expressly preempted by 8 U.S.C. § 1623 but also expressly preempted by 8 U.S.C. § 1621, which prohibits states from affording "public benefits" to illegal aliens. App. 112, 115-117. Petitioners' conflict preemption claims were that the valuable subsidy of resident tuition rates encourages illegal aliens to remain in the United States in violation of federal law, stands as an obstacle to the achievement of the congressional objective spelled out in 8 U.S.C. §§ 1601(6) and 1623, conflicts with the objective of 8 U.S.C. § 1324(a)(1)(A)(iv), and that Cal. Ed. Code § 68130.5 uses terms that conflict with the classifications of federal immigration laws. App. 88-89.

Petitioners also claimed that Cal. Ed. Code. § 68130.5 violated their rights under the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment of the United States Constitution. App. 117-118. In addition, Petitioners brought claims that Cal. Ed. Code § 68130.5 violated their

rights under California constitutional and statutory provisions.

The superior court granted Respondents' demurrer on October 4, 2006. App. 110. Petitioners timely appealed to the California Court of Appeal.

The California Court of Appeal issued a unanimous opinion on September 15, 2008, reversing in part and affirming in part the decision of the superior court. App. 38. The Court of Appeal specifically reversed the trial court's grant of a demurrer to Petitioners' preemption and Fourteenth Amendment Privileges and Immunities Claims. App. 91, 96, 101. The Court of Appeal granted Petitioners leave to amend their Fourteenth Amendment Equal Protection claim. App. 99. The Court of Appeal affirmed the superior court's demurer as to all of Petitioners' state law claims. App. 101-108.

The Court of Appeal examined whether § 68130.5 was expressly preempted under 8 U.S.C. § 1623 and found that the appropriate question concerning the application of the 8 U.S.C. § 1623 express preemption language was "whether the statute confers a benefit on the basis of residence, not whether the statute admits such a benefit is being conferred." App. 71. The Court of Appeal then explained that the "exemption" from paying nonresident tuition based on three years attendance and graduation at a California high school "create[d] a de facto residence requirement" or a "surrogate criterion for residence." App. 78. The Court of Appeal also pointed out that "[a] reasonable

person would assume that a person attending a California high school for three years also lives in California." App. 77. As a result, the Court of Appeal held that "Section 68130.5 manifestly thwarts the will of Congress expressed in 8 U.S.C. § 1623, that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States." App. 78.

The Court of Appeal observed that Cal. Ed. Code § 68130.5 could not evade express preemption under 8 U.S.C. § 1623 by making the benefit available to only some United States citizens. App. 76-78. The Court of Appeal therefore held that Cal. Ed. Code § 68130.5 fails to meet the requirement of the last clause of 8 U.S.C. § 1623 because "the state statute allows the benefit to United States citizens from other states only if they attend a California high school for three years," and thus "does not afford the same benefit to United States citizens 'without regard to' California residence." App. 87.

The Court of Appeal also ruled in favor of Petitioners on their second express preemption claim, that Cal. Ed. Code § 68130.5 was preempted by 8 U.S.C. § 1621, which prohibits states from affording "public benefits" to illegal aliens. App. 92-96. The Court of Appeal held that Cal Ed. Code § 68130.5 did not "affirmatively provide" that illegal aliens were entitled to receive the public benefits in question as required by 8 U.S.C. § 1621(d). App. 95.

The Court of Appeal also held that Cal. Ed. Code § 68130.5 was conflict preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." App. 89 (*citing De Canas v. Bica*, 424 U.S. 357 (1976)). The Court of Appeal noted that Congress actually codified its objective in 8 U.S.C. § 1601 to remove the "incentive for illegal immigration" caused by the availability of public benefits to illegal aliens. App. 89.

The Court of Appeal also held that § 68130.5 was field preempted, observing that "Congress manifested a clear purpose to oust state power with respect to the subject matter which [Cal. Ed. Code § 68130.5] attempts to regulate." App. 87.

Respondents timely appealed to the California Supreme Court. On November 15, 2010, the California Supreme Court reversed the California Court of Appeal and held that Cal. Ed. Code § 68130.5 was not expressly preempted by either 8 U.S.C. §§ 1621 or 1623. App. 6-7. Specifically, the California Supreme Court held that rather than basing the benefit on "residence," "section 68130.5's exemption from paying out-of-state tuition . . . is based on *other* criteria, specifically that persons possess a California high school degree or equivalent . . . " App. 17 (emphasis in original).

Turning to Petitioners' implied preemption arguments the California Supreme Court reversed the California Court of Appeal's holding that Cal. Ed. Code § 68130.5 was field preempted. App. 31-32. The

California Supreme Court declined to directly analyze whether or not conflict preemption applied. *See* App. 30-32. Instead, the Court reasoned, "Critical to the implied preemption analysis is the existence of two express preemption statutes, namely sections 1621 and 1623." App. 30. The Court concluded, "'Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.'" App. 31 (*quoting Viva! Internat'l Voice for Animals v. Adidas Promotional Retail Operations*, 41 Cal. 4th 929, 944-945 (2007)).

Petitioners timely filed this Petition for Writ of Certiorari on February 14, 2011.

REASONS FOR GRANTING THE WRIT

I. Review is Warranted Because the California Supreme Court's Decision, if Allowed to Stand, Permits a State to Ignore the Manifest Intent of Congress and Renders an Act of Congress a Dead Letter.

Read in a vacuum, the text of 8 U.S.C. § 1623 permits two possible interpretations. Either it was intended to prevent states from offering resident tuition rates to illegal aliens, or it was only intended to prevent states from offering resident tuition rates to illegal aliens using a "residence" criterion. Read in the context of contemporaneous statutes and legislative history, only the first interpretation is plausible.

Under the first interpretation, the phrase "on the basis of residence within a state" defines the benefit, not the criterion by which the benefit is rewarded. As is explained below, Congress intended to prevent states from providing resident tuition rates to illegal aliens. *See infra* at 18-22. Rather than using the shorter phrase "eligible for resident tuition rates," Congress chose a phrase that conveyed the same meaning, but was more encompassing, in order to prevent states from circumventing federal law by offering illegal aliens resident tuition rates using a different category of benefit (such as "grants" or "scholarships"). By choosing the phrase "eligible on the basis of residence within a State . . . for any post-secondary education benefit," the drafters selected language that was broad enough to encompass resident tuition rates, resident fee rates, resident tuition discounts, and scholarships for state residents. In other words, 8 U.S.C. § 1623 refers to "residence" in defining the *benefit* because Congress was concerned about states offering illegal aliens a particular benefit – *resident* tuition rates or the functional equivalent thereof.

Under the second interpretation, that adopted by the California Supreme Court, Congress chose the phrase "on the basis of residence within a State" not to define the benefit, but to define a mechanism through which the benefit could not be offered. However, nothing in the legislative history of 8 U.S.C. § 1623 offers the slightest support for this interpretation.

A. All Evidence of Congressional Intent Contradicts the California Supreme Court's Interpretation of 8 U.S.C. § 1623.

This Court has long held that legislative intent is the "ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In determining that intent, a court must look to the "structure and purpose of the statute as a whole." *Id.* at 486.

The text of 8 U.S.C. § 1623 is best understood if placed in the context of related statutory provisions that were passed within weeks of its enactment. Six weeks prior to enacting the IIRIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (August 22, 1996).

In passing the PRWORA, Congress took the unusual step of expressly codifying its objective: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). Congress made clear its belief that the breakdown of the rule of law in immigration had been exacerbated by the availability of public benefits for illegal aliens. The statutory text makes clear that Congress intended to cut off such benefits in order to increase compliance with federal immigration laws.

To achieve this purpose, the PRWORA included a provision intended to stop the flow of state and local public benefits to illegal aliens. Now codified at 8 U.S.C. § 1621, that provision prohibits the offering of "State or local public benefit[s]" to aliens unlawfully present in the United States. 8 U.S.C. § 1621(a). The proscribed "public benefits" include "any . . . postsecondary education . . . or any other similar benefit. . . ." 8 U.S.C. § 1621(c). However, Congress did create a savings clause: if a state nevertheless wanted to give a public benefit to illegal aliens, Congress would not stop the state from doing so, as long as the state enacted a new law that "affirmatively provided" the public benefit to illegal aliens, to assure accountability to state taxpayers. 8 U.S.C. § 1621(d). A parallel PRWORA provision, codified at 8 U.S.C. § 1611, prohibited the federal government from providing public benefits to illegal aliens.

Six weeks later, Congress took a third and decisive step. When it enacted the IIRIRA (an omnibus act that covered multiple aspects of illegal immigration), Congress singled out for additional restriction one, and only one, category of public benefits – postsecondary education benefits. Congress made clear that for this one type of public benefit, providing it to illegal aliens would be especially difficult. Under 8 U.S.C. § 1623, Congress would only allow a state to provide postsecondary education benefits to illegal aliens if the state also gave the same postsecondary education benefits to every United States citizen attending public universities in the state.

Every shred of legislative history confirms that § 1623 was intended to define the types of post-secondary education benefits that are typically distributed on the basis of residence, and then stop their distribution to illegal aliens, rather than define the criterion on which they are bestowed. A Court may look to a statute's legislative history when a statute is susceptible of two possible interpretations. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989) ("Concluding that the text is ambiguous . . . we then seek guidance from legislative history . . . "). This is particularly true with respect to preemption, which necessarily turns on congressional intent. *Lohr*, 518 U.S. at 485.

In passing 8 U.S.C. § 1623, Congress sought to make it practically impossible for states to grant in-state tuition to illegal aliens. The Conference Committee Report[10] states: "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." Conference Report 104-828, H.R. 2202 (Sept. 24, 1996) (emphasis added), 6 CT 1412.

Every Member of Congress who made a recorded statement concerning the text that would become

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[10] This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those [members of Congress] involved in drafting and studying the proposed legislation.'" *Eldred v. Ashcroft*, 537 U.S. 186, 209-210 n.16 (2003) (citations omitted).

8 U.S.C. § 1623 agreed with the description contained in the Committee Report. Senator Alan Simpson, the principal sponsor of the Senate version of the bill, summarized the provision as, "Illegal aliens will no longer be eligible for reduced in-State college tuition." 142 Cong. Rec. S11713 (1996). Senator Simpson reiterated this statement, "Without the prohibition on States treating illegal aliens more favorably than United States citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges. That is in Title V . . . " 142 Cong. Rec. S11508 (1996).

Representative Christopher Cox, a leading proponent of the measure in the House, stated, "Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools." 142 Cong. Rec. H 25264 (1996). Representative Cox also explained that this provision would not be dropped in order to get President Clinton to sign the IIRIRA: "The President wants to drop the provision that says . . . that when somebody comes from Thailand, when somebody comes from Russia, when somebody comes from you name it . . . into your State, they will not get in-State tuition benefits at your State college. Now if I move from California to Indiana, I am not going to get in-State benefits because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition." *Id.* at 25263-25264. Plainly, Congress intended to deny illegal aliens in-state tuition benefits at state colleges and universities. There is

not a scintilla of evidence in the legislative record to the contrary. *See United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009) (rejecting a party's interpretation of a statute's text where the legislative record supported a contrary understanding and "contain[ed] no suggestion" supporting the party's interpretation).

In order for the California Supreme Court to hold that Cal. Ed. Code § 68130.5 was not expressly preempted, it had to find a way to ignore this uncontradicted and unequivocal evidence of congressional intent. *There was only one way to do so: insist that the meaning of the statutory text was unambiguous and therefore consideration of legislative intent was unnecessary.* This is exactly what the California Supreme Court did. App. 20-24, insisting that there was no doubt that 8 U.S.C. § 1623 only applied to the provision of resident tuition to illegal aliens if the formal criterion of "residence" was used in the state statute. App. 17, 19-20. In so doing, the California Supreme Court committed multiple interpretive errors.

B. The California Supreme Court Created an Exception that Swallowed the Rule.

By ignoring Congressional intent, the California Supreme Court did exactly what this Court has cautioned against: It has "create[d] a loophole in the statute that Congress simply did not intend to create." *United States v. Naftalin*, 441 U.S. 768, 777 (1979); *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S.

457, 468 (2001) (Congress "does not hide elephants in mouseholes."); *see also United States v. Hayes*, 129 S. Ct. at 1087 (taking "[practical considerations]" into account in reading a statute's language so as not to read it in a way that would "frustrate Congress' manifest purpose."); *United States v. Turley*, 352 U.S. 407, 416-17 (1957) (recognizing that "Congress presumably sought to meet the need for federal action effectively rather than to leave loopholes for wholesale evasion."). Congress intended to prevent illegal aliens from receiving in-state tuition rates. Conference Report 104-828, H.R. 2202 (Sept. 24, 1996), 6 CT 1412. The California Supreme Court opinion opened a loophole that completely eviscerates the underlying provision.

According to the California Supreme Court, a state may grant postsecondary education benefits to illegal aliens while denying the benefits to many United States citizens, so long as the state uses some other phrase that effectively equates to "residence." Under this view, Congress was only worried about states using *residence in the state* as a criterion when providing in-state tuition rates to illegal aliens. App. 17, 19-20. Under the court's view, Congress was perfectly happy to allow states to extend in-state tuition rates to illegal aliens using some other criterion. App. 20. In other words, if a state were willing to play semantic games and use a surrogate criterion that roughly equates to living in the state, that would be perfectly fine. This interpretation is difficult to

sustain. Not surprisingly, there is no legislative history to support it.

Such surrogate criteria might, for example, include attendance at a high school in the state, graduation from a high school in the state, possession of a driver's license from the state, or intent to work in the state. The Court of Appeal pointed out that a state could intentionally evade 8 U.S.C. § 1623 by simply "granting in-state tuition to every illegal alien whose parents maintained a post office box in California." App. 78. In other words, the California Supreme Court held that Congress was only concerned with semantic choices made by a state legislature. A state statute merely had to avoid expressly giving a benefit "on the basis of residence," even if that benefit is functionally a residence-based benefit.

The resulting interpretation of 8 U.S.C. § 1623 is implausible. Congress could not have intended to allow states to play semantic games in order to give resident tuition to illegal aliens. Congress intended to deny illegal aliens resident tuition rates, and attempted to accomplish this end by making it financially impossible for states to give illegal aliens that benefit.[11]

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[11] One may reasonably ask why Congress did not simply declare that no state shall provide resident tuition rates to illegal aliens. Indeed, the California Supreme Court pointed out that Congress could "have simply provided . . . that 'an alien who is not lawfully present in the United States shall not be eligible' for a postsecondary education benefit." App. 19. Why Congress did not simply enact a flat prohibition is unclear, but it may have been due to concerns of comity and federalism. Instead of

(Continued on following page)

Congress required states to give that same benefit to all United States citizens, like Petitioners, if the state wanted to give the benefit to even one illegal alien.

II. Review is Warranted Because the California Supreme Court's Interpretation of "On the Basis of Residence" Conflicts with that of the Eastern District of Virginia.

Although, the California Supreme Court is the only state high court to rule on the meaning of 8 U.S.C. § 1623, one federal court has examined its meaning and reached a contrary conclusion. The United States District Court for the Eastern District of Virginia came to the opposite conclusion of the California Supreme Court in 2004. In *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 591 (E.D. Va. 2004), alien plaintiffs challenged Virginia universities' implementation of a Virginia Attorney General's Memorandum stating that illegal aliens should not be admitted to the state's public postsecondary educational institutions. The plaintiffs claimed that because "the [IIRIRA] provides that a public postsecondary educational institution may not grant in-state tuition benefits to illegal aliens unless such an institution also grants in-state tuition to out-of-state United States citizens," that Congress implicitly recognized and tacitly accepted

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an outright prohibition, Congress offered the states an alternative course of action, albeit an unattractive one – requiring a state to give residence-based postsecondary benefits to all United States citizens if the state gives the benefits to illegal aliens.

that illegal aliens might be attending public post-secondary institutions. *Id.* at 606.

The court rejected the claim that public universities had to admit illegal aliens, and explained that "[t]he more persuasive inference to draw from § 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit." *Id.* at 607. The Eastern District of Virginia did not choose the interpretation offered by the California Supreme Court in the instant case – that illegal aliens can receive in-state tuition as long as a criterion other than residence in the state is used in selecting eligible illegal aliens.

III. Review is Warranted Because the California Legislature has Recently Attempted to Expand the Postsecondary Educational Benefits Given to Illegal Aliens, Which Would Further Violate 8 U.S.C. § 1623.

Review must be granted by this Court to prevent California and other states from taking additional steps in violation of 8 U.S.C. § 1623. On August 31, 2010, the California legislature passed two bills, A.B. 1413, 2009-2010 Leg., Reg. Sess. (Cal. 2010) and S.B. 1460, 2009-2010 Leg., Reg. Sess. (Cal. 2010) which would have granted residence-based financial aid to illegal aliens using California's "exemption" from residence-based tuition model. Both bills died without the

signature of California Governor Arnold Schwarzenegger on September 30, 2010.

Specifically, A.B. 1413, § 1(a) would have granted eligibility for "any student financial aid program administered by the state of California," to any "person who meets the requirements of subdivision (a) of Section 68130.5." S.B. 1460, § 4 allowed any "student . . . exempt from paying nonresident tuition under Section 68130.5" to be eligible to receive scholarship that is derived from nonstate funds received, for the purpose of scholarships . . . " The Legislature declared that its purpose in enacting S.B. 1460 was to ensure that "all students who are exempt from nonresident tuition pursuant to Section 68130.5 of the Education Code and that are deemed to be in financial need shall be eligible for all financial aid." Thus, the California Legislature has attempted to expand the scope of postsecondary education benefits available to illegal aliens under § 68130.5, by subsidizing illegal aliens with scholarships and financial aid, in addition to in-state tuition, which would otherwise be reserved for California residents who are United States citizens or lawful permanent resident aliens.

IV. Review is Warranted Because the California Supreme Court's Decision Conflicts with Precedents of this Court Requiring Conflict Preemption Analysis Even if an Express Preemption Clause is Found Not to Apply.

As explained above, the California Supreme Court held that the Cal. Ed. Code § 68130.5 was not expressly preempted. The California Supreme Court then declined to address Petitioners' conflict preemption claims because it believed that conflict preemption could not occur when an express preemption clause did not apply. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." App. 31. (*citing Viva! Internat'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929, 944-945 (2010)). The California Supreme Court cited *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1994) in support of its holding. App. 30. However, by refusing to consider Petitioners' conflict preemption challenges, the California Supreme Court contradicted a decade of this Court's precedents holding that the presence of an express preemption clause does not limit the ordinary workings of conflict preemption. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).

As this Court recently reiterated:

> If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.

Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) (*citing Freightliner*, 514 U.S. at 287). The California Supreme Court completely ignored this Court's instructions.

In reaching its conclusion that it could skip over the conflict preemption issues in this case, the California Supreme Court committed several errors. First, the court ignored this Court's precedents. In looking to an earlier California Supreme Court holding in *Viva! Internat'l*, the court below relied on an "inference" that this Court has rejected. *See Viva! Internat'l*, 41 Cal. 4th at 945 (*citing Freightliner Corp.*, 514 U.S. at 289). In *Viva! Internat'l*, the California Supreme Court stated that when "Congress ha[d] expressly identified the scope of the state law it intend[ed] to preempt," the court could "infer Congress intended to preempt no more than that absent sound contrary evidence." *Id.* at 945 (*citing Freightliner Corp.*, 514 U.S. at 289).

Although claiming to follow *Freightliner Corp.*, the underlying problem with the earlier *Viva! Internat'l* opinion and the opinion of the California Supreme Court in the instant case is that both opinions actually adopt a standard that *Freightliner Corp.* rejected:

> The fact that an express definition of the pre-emptive reach of a statute 'implies' – i.e, supports a reasonable inference – that Congress did not intend to pre-empt other matters *does not mean that the express clause entirely forecloses any possibility of implied pre-emption.* Indeed, just two paragraphs after the quoted passage in *Cipollone* [*v. Liggett Group, Inc.*, 505 U.S. 504 (1992)], we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act[.]

Freightliner Corp., 514 U.S. at 288-289 (emphasis added). This Court further explained that its decisions following *Cipollone* likewise did not "obviate the need for analysis of an individual statute's pre-emptive effects." *Id.* (*citing CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673, n.12 (1993) ("We reject petitioner's claim of implied 'conflict' pre-emption . . . on the basis of the preceding analysis.").

After *Cipollone* and *Freightliner Corp.*, other state supreme courts made the same error as the California Supreme Court. *See Minton v. Honda of Am. Mfg.*, 80 Ohio St. 3d 62, 75-76 (1997) ("[G]iven the fact that [*Freightliner Corp.*] did not overrule *Cipollone*, and applying the principles set forth in *Cipollone*, we

agree with appellant that an implied preemption analysis is not required in this case."); *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509, 514 (1996); *Wilson v. Pleasant*, 660 N.E.2d 327, 336 (1995); *Munroe v. Galati*, 189 Ariz. 113, 117 (1997).

However, this Court's decision in *Geier v. Am. Honda Motor Co.* in 2000 should have ended the confusion as to whether an express preemption clause and a savings clause foreclose conflict preemption. "[T]he saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869. In *Geier*, this Court expressly rejected what the California Supreme Court has done – dispensing with a conflict preemption analysis because of an express preemption and savings clause. *Id.* at 869 (Petitioners unsuccessfully argued that "the saving clause has th[e effect]" of "foreclos[ing] 'any possibility of implied conflict preemption.'").

In *Geier* itself, this Court reviewed whether *Freightliner Corp.* allowed courts to dispense with the conflict preemption analysis based on express pre-emption clauses and savings clauses, stating that in *Freightliner*, "[t]his Court did not hold that . . . a [special] burden necessarily arises from the limits of an express pre-emption provision . . . The Court has thus refused to read general 'saving provisions' to tolerate actual conflict *both* in cases involving impossibility . . . *and* in 'frustration-of-purpose' cases." *Id.* at 873-74 (emphasis in original) (*citing American Telephone & Telegraph Co. v. Central Office Telephone,*

Inc., 524 U.S. 214, 228 (1998); *United States v. Locke*, 529 U.S. 89 (2000); *Internat'l Paper Co. v. Ouellette*, 479 U.S. 481, 493-494 (1987); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328-331 (1981). This Court saw "no grounds . . . for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case" because it "would engender legal uncertainty . . . when applying this complicated rule to the many federal statutes that contain some form of an express pre-emption provision, a saving provision, or as here, both." *Id.* at 874.

Pre-*Geier*, the California Supreme Court might have been able to avoid conducting a conflict preemption analysis. However, it is eleven years later, and still the California Supreme Court has failed to adhere to this Court's precedents. By ignoring *Geier* and its progeny, the California Supreme Court has returned to the time when confusion existed over the applicability of *Freightliner Corp.* and *Cipollone*. *See Geier*, 529 U.S. at 869 ("We recognize that, when the Court previously considered the pre-emptive effect of the statute's language, it appeared to leave open the question of how, or the extent to which, the saving clause saves state-law tort actions that conflict with federal regulations . . . ").

The instant case presents an opportunity for this Court to correct the clear error of the court below and clarify for other courts the rule enunciated in *Geier*. The context of this case illustrates perfectly why this

Court requires the "ordinary workings of conflict preemption" even when express preemption clauses and savings clauses exist. *Id.* at 871-74. Congress's statement of national immigration policy in 8 U.S.C. § 1601(6), its unmistakable intent behind 8 U.S.C. § 1623, as well as its prohibition of encouraging illegal aliens to remain in the United States, 8 U.S.C. § 1324(a)(1)(A)(iv), demonstrate a clear congressional objective – an objective that Cal. Ed. Code § 68130.5 plainly defeats. However, because the California Supreme Court opted not to review the conflict preemption challenges in this case, the California Legislature has been allowed to defeat the objectives of Congress. Such an approach is exactly what this Court warned against in *Geier*, stating that to the extent a court wrongly "reads into federal law toleration of a conflict that [ordinary preemption] principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to 'destroy itself.'" *Geier*, 529 U.S. at 872 (*quoting AT&T*, 524 U.S. at 228).

If California's Supreme Court decision is allowed to stand, this Court's post-*Geier* opinions will be undermined, and the pre-*Geier* confusion will return. Review by this Court is necessary to maintain uniformity in the preemption decisions rendered by state supreme courts and inferior federal courts.

V. Review is Warranted Because the California Supreme Court's Refusal to Conduct a Conflict Preemption Analysis is in Tension with Recent Federal Circuit Court Decisions that Undertake Conflict Preemption Analysis Even Where Express Preemption Does Not Apply.

Numerous recent Federal Appellate Court decisions have had the opportunity to interpret another express preemption clause and savings clause found in immigration law. 8 U.S.C. § 1324a(h)(2) preempts state and local governments from imposing "criminal and civil sanctions" on employers employing unauthorized aliens, but saves from preemption laws imposing sanctions "through licensing and similar laws." Three Federal Appellate Courts have reviewed this preemption provision of federal law, and all three determined that the state or local laws at issue were not expressly preempted by the statutory language. *See Lozano v. Hazleton*, 620 F.3d 170, 209 (3d Cir. 2010) *cert. filed* at *Lozano v. Hazleton*, No. 10-722 (Dec. 8, 2010) ("We therefore conclude that the IIRAO is a licensing law under IRCA's saving clause and saved from pre-emption."); *Chicanos Por La Causa v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2009) *cert. granted* at *Chamber of Commerce of the United States v. Candelaria*, 130 S. Ct. 3498 (2010) ("the Act is a 'licensing' measure that falls within the savings clause of IRCA's preemption provision"); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2009) (holding that two provisions of the Act were not expressly preempted

because the provisions did not condition sanctions on the employment of unauthorized aliens). All three courts then analyzed whether the various state and local laws nevertheless were conflict preempted. *See Lozano*, 620 F.3d at 210-219; *Napolitano*, 558 F.3d at 866-67; *Edmondson* 594 F.3d at 767-72.

As the Ninth Circuit correctly stated, "*Geier* recognized that state laws that fall within a savings clause and are therefore not expressly preempted are still subject to the 'ordinary working of conflict preemption principles.'" *Chicanos Por La Causa v. Napolitano*, 558 F.3d at 866 (*quoting Geier*, 529 U.S. at 869). But the California Supreme Court ignored this holding from the Ninth Circuit.

Had the California Supreme Court followed *Geier* in the instant case, the California law would not have withstood conflict scrutiny. After acknowledging Congress's objective of removing the incentive for illegal immigration caused by the availability of public benefits, the California Supreme Court brushed such congressional statements aside, claiming that "[t]his general immigration policy would have supported an absolute ban on unlawful aliens' receiving the exemption . . . [t]he general policy in section 1601 cannot change section 1623's plain language or Congress's specific charge[.]" App. 20. In other words, the California Supreme Court erroneously concluded that if Cal. Ed. Code § 68130.5 could survive an express preemption challenge under 8 U.S.C. § 1623, it was immune from preemption based on congressional objectives manifest in related provisions of federal law.

It does not logically follow that Congress, by including an express preemption provision in a statute, surveyed all of the possible implied preemption scenarios not covered by the provision and rejected them. Under the California Supreme Court's standard of dispensing with conflict preemption analysis because "Congress [somewhere] said" that "matters beyond the scope of the statute are not preempted," App. 31, a lower court may ignore clear instances of conflict preemption or field preemption, by merely addressing an express preemption claim that is present in the same litigation. Review is necessary to correct this error and finish what this Court set out to achieve in *Geier*.

CONCLUSION

If this Court does not grant Petitioners' Writ, California and other states will be able to frustrate Congress's manifest intent as expressed in 8 U.S.C. § 1623 by granting resident tuition rates and other residency-based financial aid to illegal aliens. That federal statute will become a dead letter in any state where the legislature is willing to play semantic games to defeat the objectives of Congress. Additionally, if this Court does not grant Petitioners' Writ, California will continue to ignore this Court's

post-*Geier* preemption doctrine, reviving the confusion that this Court attempted to end a decade ago.

Respectfully submitted,

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50 Cal.4th 1277, 214 P.3d 855, 117 Cal.Rptr.3d 359

Supreme Court of California
Robert MARTINEZ et al., Plaintiffs and Appellants,
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

No. S167791.
Nov. 15, 2010.

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CHIN, J.

This case involves a controversial subject: persons unlawfully present in this country. The California Legislature has provided that unlawful aliens are exempt from paying nonresident tuition at California state colleges and universities under certain circumstances. (Ed.Code, § 68130.5 (section 68130.5). Congress has prohibited the states from making unlawful aliens eligible for postsecondary education benefits under certain circumstances. (8 U.S.C. § 1623 (section 1623).) Plaintiffs challenge section 68130.5's validity, largely on the basis that it violates section 1623. Defendants argue section 68130.5 complies with federal law.

This court has received many briefs making policy arguments for and against section 68130.5's tuition exemption. We have received arguments that section 68130.5 affords deserving students educational opportunities that would not otherwise be available and, conversely, arguments that it flouts the will of Congress, wastes taxpayers' money, and encourages illegal immigration. But this court does not make policy. Whether Congress's prohibition or the Legislature's exemption is good policy is not for us to say. Rather, we must decide the legal question of whether California's exemption violates Congress's prohibition or is otherwise invalid. We must decide

the statutory question by employing settled methods of statutory construction.

The main legal issue is this: Section 1623 provides that an alien not lawfully present in this country shall not be eligible *on the basis of residence within a state* for any postsecondary education benefit unless a citizen or national of this country is eligible for that benefit. In general, nonresidents of California who attend the state's colleges and universities must pay nonresident tuition. (Ed.Code, § 68050.) But section 68130.5, subdivision (a), exempts from this requirement students – including those not lawfully in this country – who meet certain requirements, primarily that they have attended high school in California for at least three years. The question is whether this exemption is based on residence within California in violation of section 1623.

Because the exemption is given to all who have attended high school in California for at least three years (and meet the other requirements), and not all who have done so qualify as California residents for purposes of in-state tuition, and further because not all unlawful aliens who would qualify as residents but for their unlawful status are eligible for the exemption, we conclude the exemption is not based on residence in California. Rather, it is based on other criteria. Accordingly, section 68130.5 does not violate section 1623.

We also conclude plaintiffs' remaining challenges to section 68130.5 lack merit. Specifically, section

68130.5 does not violate another federal statute (8 U.S.C. § 1621 (section 1621)), is not impliedly preempted by federal law, and does not violate the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution. We reverse the judgment of the Court of Appeal, which had found section 68130.5 invalid on each of these grounds.

I. PROCEDURAL BACKGROUND

Plaintiffs allege that they are United States citizens who are or were students paying nonresident tuition at a California public university or college, and that they have been "illegally denied exemption from nonresident tuition under California Education Code section 68130.5." They have filed this lawsuit against the Regents of the University of California (Regents) and others, including officials representing the California State University System and the California Community Colleges. The complaint also alleges that "[p]laintiffs intend to and hereby maintain the claims reflected herein as a class action. The plaintiff class consists of thousands of former and current nonresident U.S. citizens too numerous to be practically joined."

The complaint states 10 causes of action. The first eight causes of action allege, in order, that section 68130.5 violates the following legal provisions: (1) section 1623; (2) section 1621; (3) 42 U.S.C. section 1983; (4) the equal protection clause of the

United States Constitution; (5) the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution; (6) "field preemption"; (7) the equal protection clause of the California Constitution; and (8) the Unruh Civil Rights Act (Civ.Code, § 51 et seq.). The ninth and 10th causes of action are for injunctive relief and declaratory relief, respectively. Plaintiffs seek a determination that section 68130.5 is invalid on each alleged ground, reimbursement of nonresident tuition fees, damages, and attorney fees.

The defendants demurred to the complaint. The trial court sustained the demurrer without leave to amend and dismissed the action. Plaintiffs appealed.

The Court of Appeal reversed the judgment. It held that plaintiffs had forfeited the claim that they have a private right of action to enforce section 1621 or section 1623 by failing to address the matter in their opening brief, and that they failed to show reversible error in the trial court's denial of certain judicial notice requests. It rejected plaintiffs' arguments that section 68130.5 conflicted with other California statutory provisions, and that it violated the due process clauses of the California and United States Constitutions, the Unruh Civil Rights Act, and article I, section 31 of the California Constitution. But the Court of Appeal also held that section 68130.5 is expressly preempted by both sections 1621 and 1623, that section 68130.5 is also impliedly preempted, that plaintiffs should be allowed leave to amend the complaint regarding their equal protection

claim, and that the complaint stated a viable claim that section 68130.5 violates the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution.

Plaintiffs, the Regents, and the California Community Colleges all petitioned for review. We denied the plaintiffs' petition and granted the Regents' and the California Community Colleges' petitions. The Regents' petition presents the issues of whether section 1621 or section 1623 preempts section 68130.5, and whether section 68130.5 violates the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution. The California Community Colleges' petition presents the issue of whether "federal immigration laws preempt California's policy of granting in-state tuition to nonresident high school graduates."

II. DISCUSSION

A. Introduction

"Each student shall be classified as a resident or nonresident at the University of California, the California State University, or the California Maritime Academy or at a California community college." (Ed.Code, § 68040.) "A student classified as a nonresident shall be required, except as otherwise provided in this part, to pay, in addition to other fees required by the institution, nonresident tuition." (Ed.Code, § 68050.) Thus, nonresidents must generally pay nonresident tuition at public universities and colleges

in California. The issue of this case revolves around when, if ever, California may exempt aliens not lawfully present in this country from having to pay nonresident tuition.

In 2001, effective January 1, 2002, the Legislature added section 68130.5 to the Education Code. (Stats.2001, ch. 814, § 2.) It provides:

> "Notwithstanding any other provision of law:
>
> "(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:
>
> "(1) High school attendance in California for three or more years.
>
> "(2) Graduation from a California high school or attainment of the equivalent thereof.
>
> "(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.
>
> "(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher

education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

"(b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes.

"(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall prescribe rules and regulations for the implementation of this section.

"(d) Student information obtained in the implementation of this section is confidential."[1]

Plaintiffs contend this statute is invalid on various grounds. Their main argument is that federal immigration law preempts it. "The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to

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[1] By its terms, section 68130.5 applies only to the California State University and California Community Colleges, and not to the University of California. Education Code section 68134 provides: "No provision of this part shall be applicable to the University of California unless the Regents of the University of California, by resolution, make such provision applicable." The parties agree that the Regents have, by resolution, made section 68130.5 applicable. (Regents of U.C., Standing Order 110.2.)

preempt state law." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935, 63 Cal.Rptr.3d 50, 162 P.3d 569.) "The '[p]ower to regulate immigration is unquestionably exclusively a federal power.'" (*In re Jose C.* (2009) 45 Cal.4th 534, 550, 87 Cal.Rptr.3d 674, 198 P.3d 1087, quoting *De Canas v. Bica* (1976) 424 U.S. 351, 354, 96 S.Ct. 933, 47 L.Ed.2d 43.) "While the immigration power is exclusive, it does not follow that any and all state regulations touching on aliens are preempted. (*De Canas v. Bica, supra,* at p. 355 [96 S.Ct. 933].) Only if the state statute is in fact a 'regulation of immigration,' i.e., 'a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain' (*ibid.*), is preemption structural and automatic. Otherwise, the usual rules of statutory preemption analysis apply; state law will be displaced only when affirmative congressional action compels the conclusion it must be. (*Id.* at pp. 356-357 [96 S.Ct. 933].)" (*In re Jose C., supra,* at p. 550, 87 Cal.Rptr.3d 674, 198 P.3d 1087.) Because section 68130.5 does not "regulate[ ] who may enter or remain in the United States, we proceed under the usual preemption rules." (*In re Jose C., supra,* at p. 550, 87 Cal.Rptr.3d 674, 198 P.3d 1087.)

"We have identified four ways in which Congress may preempt state law: express, conflict, obstacle, and field preemption." (*In re Jose C., supra,* 45 Cal.4th at p. 550, 87 Cal.Rptr.3d 674, 198 P.3d 1087.) Plaintiffs' main preemption argument is that two

federal statutes – sections 1621 and 1623 – expressly preempt section 68130.5. Because the argument concerning section 1623 is the stronger of the two, we will consider that one first and then the section 1621 argument. Then we will consider plaintiffs' remaining arguments.

The parties disagree as to whether a presumption against preemption exists. The point is unclear. In the past, the high court has indicated that a general presumption against preemption applies even in the context of immigration law. (See *In re Jose C., supra,* 45 Cal.4th at p. 551, 87 Cal.Rptr.3d 674, 198 P.3d 1087, citing *De Canas v. Bica, supra,* 424 U.S. at p. 356, 96 S.Ct. 933.) However, more recent high court authority suggests that no particular presumption applies. (See *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at p. 939, 63 Cal.Rptr.3d 50, 162 P.3d 569, and cases cited.) We need not resolve the question here because, as we explain, we find no preemption even without a presumption.

Before we turn to the issues, we must comment on terminology. Defendants and supporting amici curiae generally refer to a person not lawfully in this country by a term such as "undocumented immigrant." Plaintiffs and supporting amici curiae generally use the term "illegal alien," as did the Court of Appeal. The term "undocumented immigrant" is vague and is not used in the relevant statutes. It is also euphemistic, because it is unlawful to be in this country and to be undocumented in the sense in

which defendants use the term. On the other hand, some view the term "illegal alien" as pejorative. Wishing to be as neutral, yet as accurate, as possible in our terminology, we turn to the most relevant statutes for assistance. Section 68130.5, subdivision (a)(4), uses the phrase "a person without lawful immigration status." The federal provisions, sections 1621(d) and 1623(a), use the phrase "an alien who is not lawfully present in the United States." Both of these phrases are too bulky to be used continually. We believe it best to shorten these phrases to the two-word term "unlawful alien." Accordingly, we will use that term in this opinion.

B. Title 8 United States Code section 1623

Section 1623(a) provides: "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." The section applies "to benefits provided on or after July 1, 1998." (§ 1623(b).) Section 1623 was enacted on September 30, 1996, as part of the omnibus Illegal Immigration Reform and Immigrant Responsibility Act of 1996. (Pub.L. No. 104-208, div. C, § 505 (Sept. 30, 1996) 110 Stat. 3009-672; see *INS v. St. Cyr* (2001) 533 U.S. 289, 292, 121 S.Ct. 2271, 150 L.Ed.2d 347.)

Plaintiffs contend that section 68130.5 violates this statute, i.e., that section 68130.5 makes an unlawful alien eligible for a benefit (in-state tuition) on the basis of residence without making a citizen eligible for the same benefit. When it enacted section 68130.5, the Legislature was aware of section 1623. Indeed, Governor Gray Davis had vetoed an earlier version of what eventually became section 68130.5 because he believed section 1623 would require that the same exemption from nonresident tuition be given to all out-of-state legal United States residents. (Governor's veto message to Assem. on Assem. Bill No. 1197 (1999-2000 Reg. Sess.) (Sept. 29, 2000).) During the legislative process leading to section 68130.5's enactment, the Legislative Counsel issued an opinion concluding that the provision would not conflict with section 1623. (Ops. Cal. Legis. Counsel, No. 15729 (June 22, 2001), p. 1.) Ultimately, in an uncodified section of the bill enacting section 68130.5, the Legislature found that "[t]his act, as enacted during the 2001-02 Regular Session, does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code." (Stats.2001, ch. 814, § 1, subd. (a)(5).)

Defendants argue preliminarily that we should give deference to both the Legislative Counsel's opinion and the legislative finding. We disagree. It is true that normally we give legislative findings great weight (*Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 569, 63 Cal.Rptr.2d

467, 936 P.2d 473), and "[o]pinions of the Legislative Counsel, though not binding, are entitled to great weight when courts attempt to discern legislative intent" (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 939, 38 Cal.Rptr.3d 220, 126 P.3d 1040). But this legislative finding is one of law, not of fact, and we are not attempting to discern legislative *intent* but are deciding whether the statute is valid. The relevant legislative intent behind section 68130.5 is clear. The Legislature intended the statute to be valid. But whether a statute *is* valid is a legal determination for the courts, not the Legislature, to make. In deciding whether a federal statute expressly preempts a state statute, it is *Congress's* purpose that matters, not the state Legislature's. (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 484-485, 116 S.Ct. 2240, 135 L.Ed.2d 700.) Accordingly, we will consider the legislative finding and the Legislative Counsel's opinion – as well as the Governor's veto message regarding the predecessor bill – for their persuasive value, but we owe them no deference. In fact, we see nothing in any of these sources that adds substantially to the parties' thorough briefs, and we do not discuss them separately from the arguments in the briefs.

In deciding whether section 1623 preempts section 68130.5, we consider primarily section 1623's language. "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." (*Medtronic, Inc. v. Lohr, supra,* 518 U.S. at p. 486, 116

S.Ct. 2240.) In determining legislative intent, "[w]e first examine the statutory language, giving it a plain and commonsense meaning." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, 21 Cal.Rptr.3d 676, 101 P.3d 563.) Section 1623's language compels us to conclude that it does not prohibit what the Legislature did in enacting section 68130.5.

Section 1623(a) prohibits a state from making unlawful aliens eligible "on the basis of residence within a State" for a postsecondary education benefit. The fatal flaw in plaintiffs' argument concerning section 1623 is their contention that section 68130.5's exemption from paying out-of-state tuition is based on residence. It is not. It is based on *other* criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important here, that they have attended "[h]igh school . . . in California for three or more years." (§ 68130.5, subd. (a)(1), (2), & (4).) Indeed, both before and after section 68130.5's enactment, the law has been that unlawful immigrants cannot be deemed California residents for purposes of paying resident tuition. (Ed.Code, § 68062; *Regents of University of California v. Superior Court* (1990) 225 Cal.App.3d 972, 980, 276 Cal.Rptr. 197.) Moreover, many unlawful aliens who would qualify as California residents but for their unlawful status, and thus would not have to pay out-of-state tuition, will not be eligible for

section 68130.5's exemption – only those who attended high school in California for at least three years and meet the other requirements are eligible for the exemption.

The section 68130.5 exemption cannot be deemed to be based on residence for the simple reason that many *nonresidents* may qualify for it. Every nonresident who meets section 68130.5's requirements – whether a United States citizen, a lawful alien, or an unlawful alien – is entitled to the nonresident tuition exemption. Attending high school in California for at least three years and meeting the other requirements are not the functional equivalent of residing in California. Some American citizens who are not residents of California may also be eligible for the exemption.

Defendants point out three ways that students could have attended high school in California for at least three years and otherwise qualified for the exemption yet not be California residents. First, some students who live in an adjoining state or country are permitted to attend high school in California in some circumstances, even though they are not California residents. (Ed.Code, §§ 48050, 48051.) Second, the children of parents who live outside of California but who attend boarding schools in California might attend California high schools for three years, yet not be California residents. Third, those who attended high school in California for three years but then moved out of the state and lost their residency status would apparently be eligible for the exemption if they decided to attend a public college or university in

California. Indeed, the Regents inform us that a majority of University of California students receiving the nonresident tuition exemption are in this country lawfully.

If Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition, it could easily have done so. It could simply have provided, for example, that "an alien who is not lawfully present in the United States shall not be eligible" for a postsecondary education benefit. But it did not do so; instead, it provided that "an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence within a State*" for a postsecondary education benefit. (§ 1623(a), italics added.) The reference to the benefit being on the basis of residence must have some meaning. It can only qualify, and thus limit, the prohibition's reach. Section 1623 does not govern this case.

Finding to the contrary, the Court of Appeal stated: "The wording of the California statute, requiring attendance at a California high school for three or more years, creates a de facto residence requirement. Or, as plaintiffs put it, if section 68130.5 requires an illegal alien to attend a California high school for three years in order to qualify for the exemption from nonresident tuition, then the state has effectively established a surrogate criterion for residence." We disagree. A residency requirement and the criteria stated in section 68130.5 share certain similarities, and those who satisfy section 68130.5 will often also be residents of California. But, as we have explained,

section 68130.5's criteria are not the same as residence, nor are they a de facto or surrogate residency requirement. Congress specifically referred to *residence* – not some form of surrogate for residence – as the prohibited basis for granting unlawful aliens a postsecondary education benefit.

In determining Congress's intent, courts may also consider "the 'structure and purpose of the statute as a whole.'" (*Medtronic, Inc. v. Lohr, supra*, 518 U.S. at p. 486, 116 S.Ct. 2240.) Plaintiffs cite Congress's overall purpose in its immigration legislation in support of their expansive view of section 1623. Congress has provided statements of national policy concerning immigration. It stated that "[i]t continues to be the immigration policy of the United States that – [¶] . . . [¶] (B) the availability of public benefits not constitute an incentive for immigration to the United States" (8 U.S.C § 1601(2)(B)), and that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits" (8 U.S.C § 1601(6)). This general immigration policy would have supported an absolute ban on unlawful aliens' receiving the exemption. But section 1623 does not impose an absolute ban. The general policy in section 1601 cannot change section 1623's plain language or Congress's specific charge in this regard. (See also § 1621 [not making absolute the ban against unlawful aliens receiving public benefits], discussed in pt. II. C., *post.*)

Plaintiffs also cite legislative history. When statutory language is ambiguous, this court and the

United States Supreme Court sometimes turn to legislative history, including committee reports, to ascertain legislative or congressional intent. (*Eldred v. Ashcroft* (2003) 537 U.S. 186, 209, fn. 16, 123 S.Ct. 769, 154 L.Ed.2d 683; *Coalition of Concerned Communities, Inc. v. City of Los Angeles, supra,* 34 Cal.4th at p. 737, 21 Cal.Rptr.3d 676, 101 P.3d 563.) A House conference committee report, commenting on the language that was ultimately enacted as section 1623, states: "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." (H.R.Rep. No. 104-828, 2d Sess. p. 240 (1996) [joint explanatory statement of conference com. on revisions to H.R. No. 2202, 104th Cong.].)[2]

Defendants argue that this report does not apply to section 1623 because it concerned a related bill that was never enacted (H.R. No. 2202) rather than the omnibus immigration bill that was enacted and that included section 1623. We disagree. The language the conference committee report considered was identical to section 1623's language. (Compare

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[2] The conference committee report considered Senate amendments made in May of 1996 to House Bill No. 2202 (104th Cong., 1st Sess.(1995)), then proposed revisions to that bill. As amended, House Bill No. 2202 contained the language that was ultimately enacted as section 1623. (See H.R.Rep. No. 104-828, 2d Sess., § 507, p. 134 (1996.)) However, the bill, while reported out of conference, was not enacted. Instead, section 1623 was enacted as part of a subsequent omnibus bill. (Pub.L. No. 104-208, § 505(a) (Sept. 30, 1996) 110 Stat. 3009, 3009-672.)

H.R. No. 2202, § 507, as added by House conference committee in H.R.Rep. No. 104-828, 2d Sess., at p. 134, with Pub.L. No. 104-208, § 505, 110 Stat. 3009-672, which became § 1623.) The high court has considered legislative history concerning a bill that was not enacted when the relevant language was identical to the language of the statute actually enacted. (*Begier v. IRS* (1990) 496 U.S. 53, 66 & fn. 6, 110 S.Ct. 2258, 110 L.Ed.2d 46; see also *INS v. St. Cyr, supra*, 533 U.S. at p. 318, 121 S.Ct. 2271 [considering the same conference committee report].)

But, for a different reason, we believe the conference committee report does not reliably show that Congress intended to prohibit states entirely from exempting unlawful aliens from paying nonresident tuition. The report's general summary oversimplifies more nuanced statutory language. The high court has cautioned that "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms," and that "judicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." (*Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005) 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502.) The statement in the committee report plaintiffs cite may, *in general*, be correct to

a large extent, but it cannot change the circumstance that the actual statutory prohibition is not absolute, but qualified. Some legislators might have supported section 1623's plain language qualifying the prohibition but not have supported the committee report's seemingly absolute language. Section 1623's actual language prevails, not the committee report's.

Plaintiffs also cite statements of individual legislators that are similar to the statement in the conference committee report on which they rely. But the views of individual legislators carry little weight in interpreting the intent of the legislative body as a whole. (See *People v. Johnson* (2002) 28 Cal.4th 240, 247, 121 Cal.Rptr.2d 197, 47 P.3d 1064.) As the high court explained in response to a similar argument regarding a different statute: "Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text." (*Barnhart v. Sigmon Coal Co.* (2002) 534 U.S. 438, 457, 122 S.Ct. 941, 151 L.Ed.2d 908.)

Plaintiffs also argue that the history behind section 68130.5's enactment shows that the Legislature sought to avoid section 1623's prohibition. It does show that. Indeed, plaintiffs may be right that the Legislature's primary motivation in enacting section 68130.5 was to give unlawful aliens who live in California the benefit of resident tuition in a way that does not violate section 1623. The uncodified portion

of the law that became section 68130.5 suggests this motivation. The Legislature found and declared that "[t]here are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain, but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates"; and that "[t]hese pupils have already proven their academic eligibility and merit by being accepted into our state's colleges and universities." (Stats.2001, ch. 814, § 1, subd. (a)(1), (2).) This description seems to apply primarily to unlawful aliens. Contrary to plaintiffs' suggestion, however, nothing is legally wrong with the Legislature's attempt to avoid section 1623. As we have explained, whether the Legislature *succeeded* in this attempt is for the courts to decide, but the mere desire to avoid the restrictions provides no basis to overturn the legislation.

Section 68130.5 does not violate section 1623.

C. Title 8 United States Code section 1621

Plaintiffs argue, and the Court of Appeal found, that section 68130.5 also violates another express federal preemption provision: section 1621. Section 1621 was enacted in August 1996, shortly before section 1623, as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA). (Pub.L. No. 104-193, § 411 (Aug. 22, 1996) 110 Stat. 2268; see *League of United Latin American*

Citizens v. Wilson (C.D.Cal.1997) 997 F.Supp. 1244, 1249, 1251, 1253.) We conclude that section 68130.5 does not violate section 1621.

As relevant here, section 1621 has two parts: (1) a general rule that unlawful aliens are not eligible for state or local public benefits (§ 1621(a)); and (2) a description of the circumstances under which a state *may* make an unlawful alien eligible for those public benefits (§ 1621(d)).[3]

Section 1621(a) provides:

> "Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not –
>
> "(1) a qualified alien (as defined in section 1641 of this title),
>
> "(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. § 1101 et seq.], or
>
> "(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. § 1182(d)(5)] for less than one year,
>
> "is not eligible for any State or local public benefit (as defined in subsection (c) of this section)."

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[3] Section 1621(b) provides exceptions to the general rule that are not relevant here. Section 1621(c) defines "[s]tate or local public benefit."

Section 1621(d) provides: "A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which *affirmatively provides for such eligibility.*" (Italics added.)

Section 68130.5 was enacted in 2002, well after August 22, 1996. Subdivision (a)(4) of that section expressly refers to "the case of a person without lawful immigration status." Moreover, the uncodified portion of the law that became section 68130.5 provides: "(a) The Legislature hereby finds and declares all of the following: [¶] . . . [¶] (4) This act . . . allows all persons, *including undocumented immigrant students* who meet the requirements set forth in Section 68130.5 of the Education Code, *to be exempt from nonresident tuition* in California's colleges and universities." (Stats.2001, ch. 814, § 1, italics added.) When the same law was amended a year later, the Legislature reiterated this language. (Stats.2002, ch. 19, § 1, subd. (a)(4).) Thus, it at least *appears* the Legislature affirmatively provided that qualifying unlawful aliens are eligible for the nonresident tuition exemption. But the Court of Appeal found (and plaintiffs argue) that, for two reasons, section 68130.5 does not satisfy section 1621's "affirmatively provides" requirement.

First, the Court of Appeal held that, to comply with section 1621, "not only must the state law

specify that illegal aliens are eligible, but the state Legislature must also expressly reference title 8 U.S.C. section 1621 (which was not done in the case of § 68130.5)." We disagree. "This argument encounters a formidable obstacle: It lacks grounding in the text of [the statute]." (*Kimbrough v. U.S.* (2007) 552 U.S. 85, 102, 128 S.Ct. 558, 169 L.Ed.2d 481.) Section 1621's text contains no requirement that a state law giving unlawful aliens a benefit must expressly reference the section. As the sole support for its conclusion, the Court of Appeal cited a conference committee report on the bill that enacted section 1621, which states: "Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, *that references this provision,* will meet the requirements of this section." (H.R.Rep. No. 104-725, 2d Sess., p. 383 (1996), italics added.) However, for the reasons we explained in part II. B., *ante,* in finding unpersuasive a committee report regarding section 1623, such a report cannot change plain statutory language. (See *Exxon Mobil Corp. v. Allapattah Services, Inc., supra,* 545 U.S. at p. 568, 125 S.Ct. 2611.)

Both this court and the high court have cautioned against reading into a statute language it does not contain or elements that do not appear on its face. (*Dean v. U.S.* (2009) ___ U.S. ___, ___, 129 S.Ct. 1849, 1853, 173 L.Ed.2d 785; *Vasquez v. State of California* (2008) 45 Cal.4th 243, 253, 85 Cal.Rptr.3d 466, 195 P.3d 1049.) This caution is especially pertinent when the legislative body has shown it knows how to add

the element in express terms when it wishes to do so. (*Kimbrough v. U.S., supra,* 552 U.S. at p. 103, 128 S.Ct. 558; *Vasquez v. State of California, supra,* at p. 252, 85 Cal.Rptr.3d 466, 195 P.3d 1049.) Congress has shown it knows how to require a state specifically to reference a federal law when it wishes to do so, because it has done just that numerous times. (E.g., 12 U.S.C. § 2279aa-12(b)(2) ["The provisions of paragraph (1) shall not be applicable to any State that . . . enacts a law that – [¶] (A) *specifically refers to this subsection;* and [¶] (B) expressly provides that paragraph (1) shall not apply to the State" (italics added)]; 15 U.S.C. § 80a-3a(c) ["Notwithstanding subsections (a) and (b) of this section . . . a State may enact a statute that *specifically refers to this section* and provides prospectively that this section shall not preempt the laws of that State referred to in this section" (italics added)].)

The general rule that a court should not add an element not appearing on the face of a statute has particular force here. The Legislature could easily have referenced section 1621 in section 68130.5, and no doubt it would have done so if section 1621 had so required. It is unreasonable to conclude that Congress intended to require the states to comply with section 1621's express requirements *and* to scour committee reports for other possible requirements not visible in the statutory language. The committee report may not create a requirement not found in section 1621 itself.

Second, the Court of Appeal also concluded section 68130.5 did not provide that qualifying unlawful aliens are eligible for nonresident tuition clearly enough to satisfy the "affirmatively provides" requirement. "Although section 68130.5 does indicate that illegal aliens are eligible," the Court of Appeal said, "it does so in a convoluted manner." The Court of Appeal stated that "while we do not hold that [section 1621] requires the state statute to use the words 'illegal aliens,' we conclude the language of section 68130.5 does not clearly put the public on notice that tax dollars are being used to benefit illegal aliens." Plaintiffs go further and argue that, to satisfy section 1621, a state "would have to use the federal statutory term 'illegal alien' in its legislation – a term that would clearly put the public on notice." We disagree. Section 1621 requires no specific words, and certainly not the specific words "illegal alien," which not even section 1621 uses. We agree with the Regents' argument that "in order to comply, the state statute must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens." Section 68130.5 does so state. If Congress had intended to require more, we believe it would have said so clearly and would not have set a trap for unwary legislatures. Section 68130.5 satisfies section 1621.

D. Implied preemption

The Court of Appeal also found that section 68130.5 "falls within the principle of implied preemption in that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Echoing this conclusion, plaintiffs argue that section 68130.5 is impliedly preempted through both field preemption and conflict preemption. Congress's intent to preempt "may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." (*Altria Group, Inc. v. Good* (2008) 555 U.S. 70, ___, 129 S.Ct. 538, 543, 172 L.Ed.2d 398; see also *In re Jose C., supra,* 45 Cal.4th at p. 551, 87 Cal.Rptr.3d 674, 198 P.3d 1087.) This presents a question of Congressional purpose. (*Altria Group, Inc. v. Good, supra,* at p. ___, 129 S.Ct. at p. 543.) We find no implied preemption.

Critical to the implied preemption analysis is the existence of two express preemption statutes, namely sections 1621 and 1623. "In *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280 [115 S.Ct. 1483, 131 L.Ed.2d 385], the court clarified the relation between express preemption clauses and implied preemption doctrines, explaining that 'an express definition of the pre-emptive reach of a statute "implies" – *i.e.*, supports a reasonable inference – that Congress did not intend to pre-empt other matters,' but the express clause does not 'entirely foreclose[ ] any possibility of implied pre-emption.' [Citations.] This inference is a

simple corollary of ordinary statutory interpretation principles and in particular 'a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.' [Citation.]" (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., supra,* 41 Cal.4th at pp. 944-945, 63 Cal.Rptr.3d 50, 162 P.3d 569.)

In this case, Congress did not merely imply that matters beyond the preemptive reach of the statutes are not preempted; it said so expressly. Section 1621(c) says that a state "may" provide public benefits for unlawful aliens if it does so in compliance with the statute's requirements. This language shows Congress did not intend to occupy the field fully. (See *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 950, 28 Cal.Rptr.3d 685, 111 P.3d 954 [when federal law contains two savings clauses preserving state law in certain areas, "neither express preemption nor field preemption . . . is at issue"].) Because section 68130.5 complies with the conditions set out in both section 1621 and section 1623, those statutes cannot impliedly preempt it.

Plaintiffs and the Court of Appeal rely substantially on *League of United Latin American Citizens v. Wilson, supra,* 997 F.Supp. 1244, which held that federal law preempted the restrictions that Proposition 187, a voter initiative enacted in 1994, had placed on unlawful aliens. *Wilson,* however, is irrelevant to the issue here. Relying heavily on section

1621 (and not citing § 1623), it does, indeed, conclude that California "is powerless to enact its own legislative scheme to regulate alien access to public benefits." (*Wilson, supra,* at p. 1261.) But it adds that California "can do what the PRA permits, and nothing more." (*Ibid.*) Section 1621 is part of the PRA. So the *Wilson* opinion just brings us back to the question of what section 1621 permits. As relevant here, *Wilson* is silent on that question.

In short, Congress did not impliedly prohibit what it expressly permitted. Section 68130.5 is not impliedly preempted.

E. Privileges and immunities clause of the Fourteenth Amendment to the United States Constitution

The Court of Appeal also found that plaintiffs have stated a viable claim that section 68130.5 violates the privileges and immunities clause of section 1 of the Fourteenth Amendment to the United States Constitution (hereafter, privileges and immunities clause or, sometimes, simply the clause). That clause provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." Section 5 of the Fourteenth Amendment gives Congress the "power to

enforce, by appropriate legislation, the provisions of this article.'"[4]

The Court of Appeal explained that "[p]laintiffs' theory, as alleged in the complaint, was that, 'By making illegal aliens who possess no lawful domicile in the state of California eligible for in-state tuition rates, while denying this benefit to U.S. citizens whose lawful domicile is outside California, the state of California has denigrated U.S. citizenship and placed U.S. citizen Plaintiffs in a legally disfavored position compared to that of illegal aliens.'" It agreed with plaintiffs that section 1623 was an exercise of Congress's power to enforce the Fourteenth Amendment's provisions. It concluded, accordingly, that violating section 1623 also violated the privileges and immunities clause. We disagree. Section 1623 was not violated.

In contrast to the Court of Appeal's opinion, which seems only to declare that in violating section 1623 the state also violated the privileges and immunities clause, plaintiffs' privileges and immunities clause argument is quite broad. Plaintiffs argue that

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[4] Plaintiffs do not rely on the privileges and immunities clause of article IV, section 2, clause 1, of the United States Constitution, which provides, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." (See *Supreme Court of New Hampshire v. Piper* (1985) 470 U.S. 274, 105 S.Ct. 1272, 84 L.Ed.2d 205; *Baldwin v. Montana Fish and Game Comm'n* (1978) 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354.)

the clause guarantees the citizen's privilege "of being treated no worse than an illegal alien in the distribution of public benefits." They seem to argue that *any* state action that gives a public benefit to unlawful aliens within the state's borders, even one complying with section 1621, violates the clause unless the state gives the same public benefit to all American citizens. They cite no authority that supports this proposition. Indeed, they cite no case interpreting the clause that compares treatment of unlawful aliens living within a state's borders to treatment of citizens who do not reside in that state. The high court has rarely invoked the clause to strike down a state statute (see *Saenz v. Roe* (1999) 526 U.S. 489, 511, 119 S.Ct. 1518, 143 L.Ed.2d 689 (dis. opn. of Rehnquist, C.J.)), and it has never said anything remotely supporting plaintiffs' broad interpretation. Indeed, the court has interpreted the clause quite narrowly. (See, e.g., *Slaughter-House Cases* (1872) 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394.)

Plaintiffs note, correctly, that unlike some other constitutional provisions, the privileges and immunities clause applies only to citizens. (*Mathews v. Diaz* (1976) 426 U.S. 67, 78, fn. 12, 96 S.Ct. 1883, 48 L.Ed.2d 478.) Thus, aliens, lawful or unlawful, cannot claim benefits under the clause. But no authority suggests the clause prohibits states from ever giving resident aliens (again, lawful or unlawful) benefits they do not also give to all American citizens. The fact that the clause does not protect aliens does not logically lead to the conclusion that it also prohibits

states from treating unlawful aliens more favorably than nonresident citizens. (Moreover, were plaintiffs correct in their interpretation of the clause, section 68130.5 would pass even their test. That section does not treat citizens worse than unlawful aliens. It grants the same exemption to *all* who qualify, whether they are nonresident citizens or resident unlawful aliens.)

The clause does operate in some circumstances to prevent states from treating nonresident citizens less favorably than resident citizens. In *Saenz v. Roe, supra*, 526 U.S. 489, 119 S.Ct. 1518, the high court held that a statutory limitation on state welfare benefits for recently arrived resident citizens violates the clause. Contrary to plaintiffs' argument, however, the *Saenz* case does not support their position. The holding of that case was based on the federal right of interstate travel. (*Saenz v. Roe, supra*, at p. 503, 119 S.Ct. 1518.) But there is no equivalent federal right for nonresidents to pay reduced in-state tuition while attending a public college or university. The high court has specifically held that states may charge nonresidents, even those who are American citizens, more for attending their public postsecondary institutions than they charge residents. (*Vlandis v. Kline* (1973) 412 U.S. 441, 452-453, 93 S.Ct. 2230, 37 L.Ed.2d 63.) Plaintiffs seize on certain language the *Saenz* court used when describing the right to travel. It described the right as protecting, among other things, "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily

present in the second State. . . ." (*Saenz v. Roe, supra*, at p. 500, 119 S.Ct. 1518.) Plaintiffs glean from this language a holding that the clause guarantees a citizen's privilege of being treated no worse than an unlawful alien. They read far too much into this language coming from a case that does not involve unlawful aliens. Nothing in the *Saenz* case supports their expansive interpretation of the clause.

It cannot be the case that states may never give a benefit to unlawful aliens without giving the same benefit to all American citizens. In *Plyler v. Doe* (1982) 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786, the high court held that the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits states from denying "to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens." (*Plyler, supra*, at p. 205, 102 S.Ct. 2382; see also *id.* at p. 230, 102 S.Ct. 2382.) Thus, the high court has held that the Constitution requires states to provide a free public education to some unlawful aliens. We do not believe that the same court would also hold that the privileges and immunities clause requires states that comply with this requirement, and provide a free education to unlawful aliens, also to provide the same free education to all citizens of the entire United States.

Congress has addressed the question of post-secondary education benefits for unlawful aliens (§ 1623), but the privileges and immunities clause

does not speak to the question. Section 68130.5 does not violate that clause.

III. CONCLUSION

We reverse the judgment of the Court of Appeal and remand the matter to that court for further proceedings consistent with this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, MORENO, and CORRIGAN, JJ.

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166 Cal.App.4th 1121; 83 Cal.Rptr.3d 518;

Court of Appeal, Third District, California.
Robert MARTINEZ et al., Plaintiffs and Appellants,
v.
REGENTS OF the UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents.

No. C054124.
Sept. 15, 2008.
Certified for Partial Publication*

As Modified on Denial of Rehearing Oct. 7, 2008.
Review Granted Dec. 23, 2008.
See 117 Cal.Rptr.3d 359, 241 P.3d 855.

Immigration Reform Law Institute and Kris W. Kobach; Ropers, Majeski, Kohn & Bentley and Michael J. Brady, Redwood City, for Plaintiffs and Appellants.

Sharon L. Browne and Ralph W. Kasarda, Sacramento, for Pacific Legal Foundation, as Amicus Curiae on behalf of Plaintiffs and Appellants.

Charles F. Robinson and Christopher M. Patti, Oakland; Howard Rice Nemerovski Canady Falk & Rabkin, Ethan P. Schulman and Robert D. Hallman, San Francisco, for Defendants and Respondents.

Munger, Tolles & Olson, Bradley S. Phillips, Fred A. Rowley, Jr., Gabriel P. Sanchez, Mark R. Yohalem, Los

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II and III of the DISCUSSION.

Angeles; Lawyers' Committee for Civil Rights, Robert Rubin, San Francisco; Mexican American Legal Defense and Educational Fund, Cynthia Valenzquela, Nicholas Espiritu and Kristina Campbell, for Alicia A., Gloria A., Marcos A., Mildred A., Enrique Boca, Nicole Doe, Collin Campbell, Alex Ortiz, Linda Lin Qian, Cesar Rivadeneyra, Jennifer Seidenberg, Improving Dreams, Equality, Access and Success at U.C. Davis, Improving Dreams, Equality, Access and Success of UCLA and National Immigration Law Center as Amici Curiae on behalf of Defendants and Respondents.

SIMS, Acting P. J.

United States citizens who pay *nonresident* tuition for enrollment at California's public universities/colleges brought a lawsuit attacking a state statute (Ed. Code, § 68130.5[1]) which allows certain

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[1] Undesignated statutory references are to the Education Code.

Section 68130.5 provides: "Notwithstanding any other provision of law: [¶] (a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges: [¶] (1) High school attendance in California for three or more years. [¶] (2) Graduation from a California high school or attainment of the equivalent thereof. [¶] (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher

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illegal aliens[2] to pay the less expensive *resident* tuition to attend these universities/colleges.

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education in California not earlier than the fall semester or quarter of the 2001-02 academic year. [¶] (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

"(b) A student exempt from nonresident tuition under this section may be reported by a community college district as a full-time equivalent student for apportionment purposes.

"(c) The Board of Governors of the California Community Colleges and the Trustees of the California State University shall prescribe rules and regulations for the implementation of this section.

"(d) Student information obtained in the implementation of this section is confidential."

[2] Defendants prefer the term "undocumented immigrants." However, defendants do not cite any authoritative definition of the term and do not support their assertion that the terms "undocumented immigrant" and "illegal alien" are interchangeable. We consider the term "illegal alien" less ambiguous. Thus, under federal law, an "alien" is "any person not a citizen or national of the United States." (8 U.S.C. § 1101(a)(3).) A "national of the United States" means a U.S. citizen or a noncitizen who owes permanent allegiance to the United States. (8 U.S.C. § 1101(a)(22).) Under federal law, "immigrant" means every alien except those classified by federal law as nonimmigrant aliens. (8 U.S.C. § 1101(a)(15).) "Nonimmigrant aliens" are, in general, temporary visitors to the United States, such as diplomats and students who have no intention of abandoning their residence in a foreign country. (8 U.S.C. § 1101(a)(15)(F), (G); *Elkins v. Moreno* (1978) 435 U.S. 647, 664-665, 98 S.Ct. 1338, 1349, 55 L.Ed.2d 614, 627-628 [under pre-1996 law, held

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Plaintiffs[3] filed a class action lawsuit against defendants Regents (Regents) of the University of California (UC), Trustees (Trustees) of the California State University System (CSU), Board of Governors (Board) of the California Community Colleges (CCC), UC President Robert C. Dynes (Dynes), CSU Chancellor Charles B. Reed (Reed), and CCC Chancellor Marshall Drummond (Drummond). Plaintiffs label their pleading as a class action complaint for damages; injunctive relief; declaratory relief; federal preemption; and violation of the U.S. Constitution (14th Amend.), California Constitution (art. I, § 7), federal statute (8 U.S.C. §§ 1621, 1623; 42 U.S.C. § 1983), and the Unruh Civil Rights Act (Civ.Code, § 51). Plaintiffs appeal from a judgment of dismissal

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the question whether nonimmigrant aliens could become domiciliaries of Maryland for purposes of in-state college tuition was a matter of state law].) The federal statutes at issue in this appeal refer to "alien[s] who [are] not lawfully present in the United States." (8 U.S.C. §§ 1621(d), 1623.) In place of the cumbersome phrase "alien[s] who [are] not lawfully present," we shall use the term "illegal aliens."

[3] The named plaintiffs are Robert Martinez, Cory McMahon, Onson Luong, Scott Nass, Justin Rabie, Mark Hammes, Steven Hammes, David Hammes, Ash Caloustian, Aaron Dallek, Soleil Teubner, Mara McDermott, Adam Anderson, Demyan Drury, Casey Meguro, Chaning Jang, Kyle Dozeman, Kellan Didier, James Deutsch, Patrick Bilbray, Briana Bilbray, Brian Bilbray, Corey Robertson, Daniel Alameda, Dan Goldberg, Tim Kozono, Joseph Konrad, David Taylor, Suzanne Kattija-Ari, Justine Smith, Amanda Hildebrand, Aaron Malone-Stratton, Pamela Stratton, Michal [*sic*] Bulmash, Jimmy Davault, III, Matt Bittner, Antwann Davis, Arrington Dennison, Kathryn Jelsma, Emily Grant, Peter Shea, and Adam Thomson.

following the trial court's sustaining of defendants' demurrers without leave to amend.

Numerous legal issues are addressed in this case. However, the most significant issue is whether California's authorization of in-state tuition to illegal aliens violates a federal law, title 8 of the United States Code (U.S.C.) section 1623, which provides as pertinent:

"Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."

The respondents argue the federal statute is not violated for two reasons:

1. Respondents say in-state tuition is not a "benefit" within the meaning of the federal law. For reasons we shall explain, we conclude in-state tuition, which is some $17,000 per year cheaper than out-of-state tuition at UC, is a "benefit" conferred on illegal aliens within the meaning of the federal law.

2. Respondents argue in-state tuition is not granted "on the basis of residence within a state" as required by federal law. Respondents point to the fact that in-state tuition for illegal aliens is based on a student's having attended a California high school for

three or more years and on the student's having graduated from a California high school or having attained "the equivalent thereof." (§ 68130.5, fn. 1 *ante*.) As we shall explain, the three-year attendance requirement at a California high school is a surrogate residence requirement. The vast majority of students who attend a California high school for three years are residents of the state of California. Section 68130.5 thwarts the will of Congress manifest in title 8 U.S.C. section 1623.

We shall conclude the trial court erred in determining the complaint failed as a matter of law. We shall reverse the judgment of dismissal and allow the case to proceed in the trial court.[4]

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[4] Pacific Legal Foundation filed an amicus curiae brief in favor of plaintiffs. An amicus curiae brief in favor of defendants was filed by Alicia A., Gloria A., Marcos A., Mildred A., Enrique Boca, Nichole Doe, Collin Campbell, Alex Ortiz, Linda Lin Qian, Cesar Rivadeneyra, Jennifer Seidenberg; Improving Dreams, Equality, Access and Success at U.C. Davis; Improving Dreams, Equality, Access and Success of UCLA; and National Immigration Law Center.

We deny as unnecessary Pacific Legal Foundation's requests for judicial notice (made in their amicus curiae brief) of records of the California Postsecondary Education Commission as assertedly showing that taxpayers, some of whom cannot afford to send their own children to college, subsidize the college education of students who pay in-state tuition. "The higher tuition charged nonresident students tends to distribute more evenly the cost of operating and supporting the University of California between residents and nonresidents attending the university [and] appears

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BACKGROUND

The complaint, filed December 14, 2005, alleged as follows:

Plaintiffs are U.S. citizens from states other than California and are students, or tuition-paying parents of students, enrolled after January 1, 2002, in a course of study for an undergraduate or graduate degree at a California public university or college, who allege they have been illegally denied exemption from nonresident tuition under section 68130.5,[5]

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to be a reasonable attempt to achieve a partial cost equalization by collecting lower tuition fees from those persons who, directly or indirectly, have made some contribution to the economy of the state. . . ." (*Kirk v. Regents of University of California* (1969) 273 Cal.App.2d 430, 444, 78 Cal.Rptr. 260.)

[5] The complaint alleges plaintiffs are U.S. citizens who have been classified under California law as "nonimmigrant aliens." This allegation does not make sense. U.S. citizens are not "aliens" at all. (8 U.S.C. § 1101(a)(3) ["The term 'alien' means any person not a citizen or national of the United States"].) Nothing in California law defines "alien" differently. Plaintiffs contend they were illegally denied exemption from nonresident tuition under section 68130.5. Section 68130.5 states that a student, other than a "nonimmigrant alien" within the meaning of title 8 U.S.C section 1101(a)(15), is exempt from paying nonresident tuition if he or she meets the requirements, e.g., high school attendance in California for three years, graduation from a California high school, etc. Plaintiffs allege this statute characterizes out-of-state U.S. citizens as "nonimmigrant aliens." In reviewing a demurrer, we do not accept as true allegations of legal conclusions. Section 68130.5 defines "non-immigrant alien" with reference to federal law. Under the federal law, "nonimmigrant aliens" are generally aliens admitted

(Continued on following page)

which gives the benefit of resident tuition to illegal aliens.

Plaintiffs do not claim they attended a California high school, as required to qualify for the section 68130.5 benefit. Rather, plaintiffs claim the attendance requirement is a de facto residence requirement, preempted by federal immigration law, which illegally discriminates against plaintiffs by denying them a benefit provided to illegal aliens.

The complaint alleged defendants engaged in an "Illegal Alien Tuition Scheme," granting illegal aliens a tuition exemption denied to nonresident U.S. citizens in violation of federal law. The complaint alleged defendants knew section 68130.5 violated and was preempted by federal law.

The complaint alleged upon information and belief that, during the Fall 2005 term, undergraduate tuition and fees were:

– For UC, $6,769 for a resident undergraduate, and $24,589 for nonresident undergraduates ($17,304 tuition plus other fees);

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to this country for temporary periods, including students, diplomats and their servants, etc., who intend to return to their homeland. (8 U.S.C. § 1101(a)(15).) Thus, given the allegation that plaintiffs are U.S. citizens, plaintiffs are not nonimmigrant aliens. We assume for purposes of this appeal that plaintiffs were denied an exemption from nonresident tuition not because they were considered nonimmigrant aliens, but because they did not attend a California high school for three years and attain a California high school diploma or equivalent.

– For CSU, a campus average of $3,164 for resident undergraduates, and $13,334 for nonresident undergraduates;

– For CCC, $26 per unit for residents and $135 per unit for nonresidents, with the average student taking 15 units per semester.

Although section 68130.5 states it does not apply to UC unless the Regents make it applicable (§ 68134 ["No provision of this part shall be applicable to the University of California unless the Regents of the University of California, by resolution, make such provision applicable"]), plaintiffs' complaint alleged the Regents adopted section 68130.5 in Standing Order 110.2 – after lobbying for legislation (§ 68130.7[6]) limiting their legal exposure (as well as the exposure of the other defendants) in the event of lawsuits.

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[6] Section 68130.7 provides: "If a state court finds that Section 68130.5, or any similar provision adopted by the Regents of the University of California, is unlawful, the court may order, as equitable relief, that the administering entity that is the subject of the lawsuit terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or other retroactive relief, may be awarded. In any action in which the court finds that Section 68130.5, or any similar provision adopted by the Regents of the University of California, is unlawful, the California Community Colleges, the California State University, and the University of California are immune from the imposition of any award of money damages, tuition refund or waiver, or other retroactive relief."

The complaint also set forth legislative history and plaintiffs' legal conclusions regarding statutory interpretation, which we address in our discussion.

The complaint set forth 10 counts, as follows:

1. *Violation of Title 8 U.S.C. section 1623:*[7] Plaintiffs alleged it is an illegal alien's residence in California that entitles him or her to attend a California high school, and therefore section 68130.5 imposes a *de facto* durational residency requirement. Because section 68130.5 does not give the same benefit to U.S. citizens without regard to residence, the California statute violates and is preempted by title 8 U.S.C. section 1623 (fn. 7, *ante*) under the Supremacy Clause of the United States Constitution. (U.S. Const., art. VI, § 2.) Plaintiffs alleged under this and all counts that they "have been injured by having paid nonresident tuition while illegal aliens have been unlawfully exempt. . . ."

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[7] Title 8 U.S.C. section 1623 provides: "(a) In general. Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident. [¶] (b) Effective date. This section shall apply to benefits provided on or after July 1, 1998."

2. Violation of Title 8 U.S.C. section 1621:[8] Exemption from nonresident tuition confers a benefit

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[8] Title 8 U.S.C. section 1621 provides: "(a) In general. Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not [¶] (1) a qualified alien (as defined in section 1641 of this title), [¶] (2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] or [¶] (3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for less than one year, [¶] is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

"(b) [Exceptions for specified health care, emergency disaster relief, health assistance, and program services necessary for protection of life or safety].

"(c)(1) [¶] State or local public benefit definition. Except as provided in paragraphs (2) and (3), for purposes of this subtitle the term 'State or local public benefit' means. . . . [¶] (B) any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

"[¶] . . . [¶]

"(d) State authority to provide for eligibility of illegal aliens for state and local public benefits. A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after [August 22, 1996], which affirmatively provides for such eligibility." (Italics added.)

in violation of title 8 U.S.C. section 1621 (fn. 8, *ante*), and the California Legislature failed to provide affirmatively for such eligibility as specified in title 8 U.S.C. section 1621(d).

3. *Title 42 U.S.C. Section 1983:* Defendants Dynes, Reed, and Drummond, in their capacities as President or Chancellors, acting under color of state law, deprived out-of-state U.S. citizens the exemption from nonresident tuition granted to illegal aliens, in violation of the Fourteenth Amendment and title 8 U.S.C. section 1623.

4. *Equal Protection (U.S. Const.):* Plaintiffs are similarly situated with illegal alien beneficiaries of section 68130.5, because neither class is lawfully domiciled in California, yet plaintiffs are discriminated against in tuition rates.

5. *Privileges and Immunities Clause (U.S. Const.):* Section 68130.5 violates the privileges and immunities clause of the Fourteenth Amendment, denigrating U.S. citizens by treating them worse than illegal aliens.

6. *Field Preemption:* In addition to express preemption under title 8 U.S.C. section 1623, section 68130.5 is preempted by "field preemption," in that Congress occupies the field of immigration law, and section 68130.5 stands as an obstacle to Congress's objective.

7. *Equal Protection (Cal. Const.):* Section 68130.5 violates California's equal protection clause (Cal.

Const., art. I, § 7), by denying out-of-state U.S. citizens an exemption from nonresident tuition that is granted to illegal aliens.

8. *Unruh Civil Rights Act:* Defendants violated section 68062[9] (which precludes illegal aliens from establishing residence in California) and discriminated against plaintiffs based on geographic origin as out-of-state U.S. citizens, in violation of Civil Code section 51.[10] Plaintiffs sought actual damages or statutory damages (Civ.Code, § 52) of $4,000 for each class member for each offense (each offense consisting of each unlawful tuition bill paid by each class member) plus $25,000 for each class member.

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[9] Section 68062 provides: "In determining the place of residence the following rules are to be observed: [¶] (a) There can only be one residence. [¶] (b) A residence is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose. [¶] . . . [¶] (f) The residence of the parent with whom an unmarried minor child maintains his or her place of abode is the residence of the unmarried minor child. [¶] . . . [¶] (h) *An alien, including an unmarried minor alien, may establish his or her residence, unless precluded by the Immigration and Nationality Act (8 U.S.C. § 1101, et seq.) from establishing domicile in the United States.*" (Italics added.)

[10] Civil Code section 51, subdivision (b), provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

9. *Injunctive Relief:* Plaintiffs sought a preliminary and permanent injunction, enjoining defendants from denying to plaintiffs the exemption from nonresident tuition to which they are entitled by title 8 U.S.C. section 1623 (fn. 7, *ante*), enjoining defendants from enforcing section 68130.5 with respect to exempting illegal aliens from nonresident tuition, and enjoining defendants from discriminating against plaintiffs in favor of illegal aliens.

10. *Declaratory Relief:* Plaintiffs sought a judicial declaration that the illegal alien tuition scheme is preempted by federal law and violates the federal statutes, equal protection, the privileges and immunities clause, and the Unruh Act.

In addition to injunctive and declaratory relief, the complaint's prayer sought tuition reimbursement.

Defendants filed demurrers.

The demurrer of the Trustees, Reed, the Board, and Drummond (collectively Trustees/Board) argued (1) plaintiffs lacked standing to challenge section 68130.5 because they do not qualify for an exemption from nonresident tuition and cannot establish any compensable injury; (2) the federal laws do not create a private right of action in plaintiffs; (3) any damage claims should be dismissed because plaintiffs failed to submit a claim in compliance with the Government Claims Act (Gov.Code, § 900 et seq.); and (4) the Board and Drummond were improper parties.

The demurrer of the Regents and Dynes (collectively Regents) argued:

(1) The exemption from nonresident tuition is not a "benefit" within the meaning of the federal law; section 68130.5 does not confer the exemption on the basis of residence; to the extent the state statute confers a benefit on illegal aliens it is expressly authorized by title 8 U.S.C. section 1621(d), which allows a state affirmatively to provide for such eligibility; and Congress did not intend a complete ouster of state power.

(2) The title 42 U.S.C. section 1983 claim failed because the complaint did not allege deprivation of any right protected by the Constitution or laws of the United States.

(3) The equal protection claim failed because section 68130.5 does not discriminate on the basis of alienage and is rationally related to a legitimate government purpose.

(4) The privileges and immunities claim failed because section 68130.5 does not discriminate on the basis of citizenship, and resident tuition is not a privilege.

(5) The Unruh Act claim failed because the Unruh Act does not prohibit discrimination based on geographic origin, and a state may charge higher tuition for out-of-state students than to state residents and others.

(6) The ninth count for injunctive relief failed because a request for injunctive relief is not a cause of action.

(7) The tenth count for declaratory relief failed because a cause of action for declaratory relief may not simply restate other causes of action.

In addition to the two demurrers, the Regents and Dynes filed a motion to strike from the complaint the request for tuition reimbursement; plaintiffs filed requests for judicial notice; and various persons (some of whom sought to proceed under fictitious names) filed a motion for leave to intervene.

After a hearing, the trial court took judicial notice of some but not all of plaintiffs' materials, sustained defendants' demurrers without leave to amend, denied as moot the motion to strike, denied the intervention motion, and denied as moot the motion to proceed under fictitious names. The trial court sustained the Regents' demurrer without leave to amend on all counts, except the third count alleging a federal civil rights violation (42 U.S.C. § 1983), as to which the court overruled the demurrer on the ground the count was based not on federal preemption (as asserted in the Regents' demurrer), but on alleged violation of title 8 U.S.C. sections 1621 and 1623. However, the court dismissed the third count (federal civil rights violation) as to all defendants on the ground stated in the demurrer of the Trustees/Board – that the federal immigration statutes (8 U.S.C. §§ 1621, 1623) conferred no private right of

action in plaintiffs and therefore could not support a federal civil rights claim. As to other grounds for demurrer asserted by the Trustees/Board, the trial court rejected defendants' argument that plaintiffs lacked standing (a ruling not challenged by defendants in their response to this appeal), sustained the demurrer without leave to amend as to the first three counts, and concluded it was unnecessary to rule on other grounds given the court's sustaining of the Regents' demurrer without leave to amend.

Plaintiffs objected to the proposed judgment on the ground the third count (42 U.S.C. § 1983) remained outstanding. The trial court overruled the objection and entered a judgment of dismissal, from which plaintiffs appeal.

DISCUSSION

I. *Standard of Review*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, . . . [t]he reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citation.]' However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory.

[Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

The rules of federal statutory interpretation are much the same as those used when construing California statutes; our primary function is to give effect to legislative intent. (*Johnson v. United States* (2000) 529 U.S. 694, 710, fn. 10, 120 S.Ct. 1795, 146 L.Ed.2d 727; *Black v. Dept. of Mental Health* (2000) 83 Cal.App.4th 739, 747, 100 Cal.Rptr.2d 39.)

II.-III.**

IV. *Claimed Conflict between State Statutes*

Although not pleaded as a cause of action, plaintiffs argue defendants, by giving illegal aliens resident tuition under section 68130.5, violated section 68062 (fn. 9, *ante*), which bars illegal aliens from establishing residency for tuition purposes. Plaintiffs characterize this claim as one of illegal and unconstitutional discrimination because *Regents of University of California v. Superior Court* (1990) 225 Cal.App.3d 972 at page 981, 276 Cal.Rptr. 197 (*Bradford*), supposedly said a violation of section 68062 would constitute discrimination against citizens of sister states.

** See footnote *, *ante*.

However, this contention is really a claimed conflict between state statutes, which does not help plaintiffs, because section 68130.5, as the later-enacted statute, would prevail. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1038, 56 Cal.Rptr.3d 814, 155 P.3d 226.)

Bradford, supra, 225 Cal.App.3d at pages 980 through 981, 276 Cal.Rptr. 197, held section 68062, subdivision (h), precludes illegal aliens from qualifying as California residents for college tuition purposes, and as so construed, did not violate equal protection. *Bradford, supra,* 225 Cal.App.3d at pages 981 through 982, 276 Cal.Rptr. 197, observed a state cannot exclude illegal aliens from free public elementary and secondary schools (*Plyler v. Doe* (1982) 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786), but said the heart of *Plyler v. Doe* was that the "stigma of illiteracy" would mark these children for the rest of their lives. (In contrast, it was said in *Lister v. Hoover* (7th Cir.1983) 706 F.2d 796, 797, 805, a due process case, that the interest in lower *college* tuition is slight.)

Plaintiffs read too much into *Bradford, supra,* 225 Cal.App.3d 972, 276 Cal.Rptr. 197, which said, in upholding the constitutionality of section 68062, that the state's legitimate interests in denying resident tuition to illegal aliens (i.e., policy matters for legislative determination) included the interest in avoiding discrimination against citizens of sister states. (*Id.* at p. 981, 276 Cal.Rptr. 197.)

Bradford does not invalidate section 68130.5.

To the extent that section 68130.5, as a de facto residence statute, could be said to conflict with section 68062, the result would be, at most, an implied repeal of section 68062 as the earlier-enacted statute – a result which does not advance plaintiffs' case. Thus, when two state statutes are so inconsistent that there is no possibility of concurrent operation, the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature. (*Professional Engineers in California Government v. Kempton, supra,* 40 Cal.4th at p. 1038, 56 Cal.Rptr.3d 814, 155 P.3d 226.) That defendants do not claim an implied repeal does not, as urged by plaintiffs, determine the matter.

We conclude plaintiffs fail to show they could amend the complaint to allege a viable claim that section 68130.5 constitutes discrimination in violation of section 68062.

V. *Federal Preemption*

A. *General Principles*

Preemption has been explained in various ways. The United States Supreme Court has said:

"[S]tate law is pre-empted under the Supremacy Clause, U.S. Const, Art. VI, cl 2,[14] in three circumstances. First, Congress can define explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.

"Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' [Citation.] Although [the United States Supreme Court] has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: 'Where . . . the field which Congress is said to have preempted'

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[14] The Supremacy Clause provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." (U.S. Const., art. VI, cl.2.)

includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be '"clear and manifest."' [Citations.]

"Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*English v. General Electric Co.* (1990) 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65, 74.)

The United States Supreme Court in *De Canas v. Bica* (1976) 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 held that a California statute (Labor Code, § 2805), prohibiting an employer from knowingly employing illegal aliens at the expense of lawful resident workers, was not unconstitutional as a regulation of immigration and was not preempted by the Immigration and Nationality Act. *De Canas* articulated three tests to be used in determining whether a state statute related to immigration is preempted.

First, the court must determine whether the state statute is a "regulation of immigration" (i.e., a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain). (*De Canas v. Bica, supra,* 424 U.S. at p. 356, 96 S.Ct. 933.) If the state statute regulates immigration, it is preempted because the

power to regulate immigration is exclusively a federal power. (*Ibid.*) That aliens are subjects of a state statute does not necessarily constitute a "regulation of immigration." (*Ibid.; People v. Salazar-Merino* (2001) 89 Cal.App.4th 590, 598-599, 107 Cal.Rptr.2d 313 [Pen.Code, § 114, imposing criminal penalties for using a false document to conceal true citizenship or resident alien status, was not preempted by federal immigration law].)

Second, even if the state statute does not regulate immigration, it is preempted if Congress manifested a clear purpose to effect a complete ouster of state power, including state power to promulgate laws not in conflict with federal laws, with respect to the subject matter which the statute attempts to regulate. (*De Canas v. Bica, supra,* 424 U.S. at p. 357, 96 S.Ct. 933.) An intent to preclude state action may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. (*Ibid.*) Third, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at p. 363, 96 S.Ct. 933.) A statute is preempted under this third test if it conflicts with federal law, making compliance with both state and federal law impossible. (*Ibid.; Toll v. Moreno* (1982) 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 [state university's policy of denying in-state status to domiciled nonimmigrant aliens holding G-4 visas, violated supremacy clause]; *League of United Latin American Citizens v. Wilson* (C.D.Cal.1997) 997 F.Supp. 1244,

1253, 1256 (*LULAC II*) [held that Congress in federal legislation enacted in 1996 occupied the field of regulation of public postsecondary education benefits to aliens, thereby preempting portions of California initiative measure Proposition 187, including a provision denying public postsecondary education to illegal aliens]; *League of United Latin American Citizens v. Wilson* (C.D.Cal.1995) 908 F.Supp. 755 (*LULAC I*) [other federal immigration law preempted portions of Proposition 187].)

B. *Preemption by Title 8 U.S.C. Section 1623*

Plaintiffs' principal argument is that title 8 U.S.C. section 1623 preempts section 68130.5. We agree they have stated a cause of action. The demurrer should have been overruled.

As indicated, title 8 U.S.C. section 1623 (fn. 7, *ante*) provides, "Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."

Title 8 U.S.C. section 1623 was enacted in September 1996, as part of the IIRIRA.[15] (Pub.L. No. 104-208, Div. C (Sept. 30, 1996) § 505, 110 Stat. 3009-672.)

Section 68130.5 (enacted by Stats.2001, ch. 814, § 2) makes illegal aliens eligible for in-state tuition without affording in-state tuition to out-of-state U.S. citizens without regard to California residence.

Defendants argue there is no preemption problem, because section 68130.5 does not confer a "benefit" based on "residence" within the meaning of title 8 U.S.C. section 1623. We disagree.

1. *Section 68130.5 Confers a "Benefit"*

Defendants argue the term "benefit" in title 8 U.S.C. section 1623 is limited, because the federal statute refers to "amount," which means monetary payments, and in-state tuition does not involve the payment of any money to students. However, defendants cite no authority supporting their illogical assumption that "amount" must mean monetary payment to the beneficiary. The complaint alleges the benefit of in-state tuition is a calculable amount, and it would certainly appear to be so. We therefore reject

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[15] This was shortly after enactment of title 8 U.S.C. section 1621 (fn. 8, *ante*), which we discuss *post*. Defendants agree title 8 U.S.C. section 1623 narrowed the authorization previously conferred on states by the earlier statute to make exceptions to the federal restrictions.

defendants' argument that "benefit" in title 8 U.S.C. section 1623 means only the payment of money to the person being benefited.

Even assuming for the sake of argument that title 8 U.S.C. section 1623 could be considered ambiguous as to the meaning of "benefit," the conference committee report, which is an authoritative source of Congressional intent (*Eldred v. Ashcroft* (2003) 537 U.S. 186, 210, fn. 16, 123 S.Ct. 769, 154 L.Ed.2d 683), stated, "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." (Conf. Report 104-828, H.R. 2202, § 507 (Sept. 24, 1996).) Thus, "benefit" in title 8 U.S.C. section 1623 includes in-state tuition.

Defendants also argue "benefit" in title 8 U.S.C. section 1623 should be given the same meaning as "benefit" in title 8 U.S.C. section 1621, which defendants interpret as being limited to money paid to students. Again, we disagree.

Thus, title 8 U.S.C. section 1621 defines "benefit" in part as "any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, *or* any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government *or* by appropriated funds of a State or local government." (8 U.S.C. § 1621(c)(1)(B), italics added.)

Defendants maintain the term "postsecondary education" in title 8 U.S.C. section 1621 is modified

by the language "for which payments or assistance are provided," such that Congress proscribes spending public funds for an illegal alien's college education but has not proscribed eligibility for an exemption from nonresident tuition, which involves no payment or direct financial assistance.

However, since the terms in title 8 U.S.C. section 1621 are separated by the word "or" (postsecondary education benefit "or" other similar benefit for which payments or assistance are provided by an agency or by appropriated funds), defendant's modification theory is implausible. Even assuming for the sake of argument that "postsecondary education" is modified by the language "for which payments or assistance are provided," in-state tuition constitutes assistance, and defendants fail to show otherwise.

Defendants apply their own gloss to the word "assistance," asserting it must be "direct financial assistance." To the extent this position considers the term "assistance" to be limited to direct financial aid, we observe the exclusion of illegal aliens from student financial aid is already covered in 20 U.S.C. section 1091, which states, "In order to receive any grant, loan, or work assistance under [provisions concerning student financial aid], a student must . . . [¶] be a citizen or national of the United States, a permanent resident of the United States, able to provide evidence from the Immigration and Naturalization Service that he or she is in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident, [or] a

citizen of any one of the Freely Associated States." (20 U.S.C. § 1091(1)(5).) In California, illegal aliens are barred from receiving financial assistance in the form of, e.g., Cal. Grant awards. (§§ 69433.9, 69535.)

Moreover, one of the cases cited by defendants defeats their position. Thus, *California Rural Legal Assistance v. Legal Services Corp.* (9th Cir.1990) 917 F.2d 1171, said that the provision of legal services did not constitute "financial assistance" within the meaning of a federal statute (8 U.S.C. § 1255a) imposing a five-year ban on "financial assistance" to amnesty aliens (aliens who were allowed to legalize their status under the amnesty provisions of the Immigration Reform and Control Act of 1986). (*Id.* at pp. 1172, 1175-1176.) *CRLA* expressly reached its conclusion because the federal statute used the more narrow language "financial assistance" rather than the broader term "assistance." (*Id.* at p. 1176.) Thus, *CRLA* does not help defendants here, where the federal statute (8 U.S.C. § 1621) uses the broader term "assistance."

Defendants' other cited authorities do not support their position. Defendants quote from *Equal Access Education v. Merten* (E.D.Va.2004) 305 F.Supp.2d 585 (*Merten*), which said the federal law (of which title 8 U.S.C. sections 1621 and 1623 are a part) addressed "only post-secondary monetary assistance paid to students or their households. . . ." (*Id.* at p. 605.) However, defendants take the quote out of context. *Merten* was not deciding the meaning of assistance in title 8 U.S.C. section 1621; it was rejecting

the plaintiffs' argument that Virginia's policy of denying college admission to illegal aliens was preempted by a different federal statute (8 U.S.C. § 1642). *Merten* said, "the scheme PRWORA [title 8 U.S.C. § 1601 et seq.] creates pertains to benefits not at issue here. In the area of post-secondary education, PRWORA addresses only post-secondary monetary assistance paid to students or their households, not admissions to college or university." (*Merten, supra*, at p. 605.) *Merten* went on to make a point (cited to us in plaintiffs' reply brief) that the reasonable inference to draw from title 8 U.S.C. section 1623 is that public colleges need not admit illegal aliens at all, but if they do, the aliens cannot receive in-state tuition unless out-of-state U.S. citizens receive in-state tuition. (*Merten, supra*, 305 F.Supp.2d at p. 606.) Again, however, *Merten* was deciding an issue about preemption concerning admissions, not tuition. Thus, *Merten* has no bearing on the case before us.

Defendants cite *Doe v. Wilson* (1997) 57 Cal.App.4th 296 at page 299, 67 Cal.Rptr.2d 187, which said newly-enacted title 8 U.S.C. section 1621 prohibited California from expending public funds to provide prenatal care to illegal aliens, and the state could enforce emergency regulations adopted to comply with the federal legislation. Nothing in *Doe v. Wilson* limits the scope of the federal law.

Defendants cite a law review article construing the federal law as excluding in-state tuition. (Ruge & Iza, *Higher Education For Undocumented Students: The Case for Open Admission and In-State Tuition*

Rates for Students Without Lawful Immigration Status (2005) 15 Ind. Int'l. & Comp. L.Rev. 257, 267.) The law review article reflects nonauthoritative opinion, and we do not agree with it on this point.

We conclude section 68130.5 confers a "benefit" within the meaning of title 8 U.S.C. sections 1621 and 1623.

2. *Section 68130.5 is Based on Residence*

Defendants argue section 68130.5 does not condition eligibility for in-state tuition "on the basis of residence within a State" as stated in title 8 U.S.C. section 1623. We disagree.

The meaning of "residence" may vary according to the context, but "residence" generally requires both physical presence and an intention to remain. (*Martinez v. Bynum* (1983) 461 U.S. 321, 330-331, 103 S.Ct. 1838, 1844, 75 L.Ed.2d 879, 888 [state residency requirement for admission to tuition-free public schools did not violate federal equal protection clause]; 27B Cal.Jur.3d (2004) Domicile, §§ 2-3, pp. 617-619.) State domicile is a matter of state law. (*Elkins v. Moreno, supra,* 435 U.S. 647, 662, fn. 16, 98 S.Ct. 1338, 1347, 55 L.Ed.2d 614, 626.)

Under section 68062 (fn. 9, *ante*), illegal aliens are barred from establishing California residency for college/university in-state tuition purposes if they are precluded by federal law (8 U.S.C. § 1101) from establishing domicile in the United States. (*Bradford,*

supra, 225 Cal.App.3d at p. 980, 276 Cal.Rptr. 197 ["section 68062, subdivision (h), precludes undocumented alien students from qualifying as residents of California for tuition purposes"]; *American Assn. of Women v. Board of Trustees* (1995) 31 Cal.App.4th 702, 706, 38 Cal.Rptr.2d 15 [*Bradford* is binding on both UC and CSU].) *Bradford, supra,* 225 Cal.App.3d at page 981, 276 Cal.Rptr. 197, recognized legitimate state interests in denying resident tuition to illegal aliens, including "the state's interests in not subsidizing violations of law; in preferring to educate its own lawful residents; in avoiding enhancing the employment prospects of those to whom employment is forbidden by law; in conserving its fiscal resources for the benefit of its lawful residents; in avoiding accusations that it unlawfully harbors illegal aliens in its classrooms and dormitories; in not subsidizing the university education of those who may be deported; in avoiding discrimination against citizens of sister states and aliens lawfully present; in maintaining respect for government by not subsidizing those who break the law; and in not subsidizing the university education of students whose parents, because of the risk of deportation if detected, are less likely to pay taxes." (*Ibid.*)

Bradford predated the enactment of section 68130.5, which on its face allows illegal aliens to qualify for resident tuition, purportedly without establishing residence.

"Residence" within the meaning of the California tuition statutes means, "the place where one remains

when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose." (§ 68062, subd. (b), fn. 9, *ante*.) The student must couple physical presence in California with objective evidence of intent to make California the home for other than a temporary purpose. (Cal.Code Regs., tit. 5, § 54020 [community colleges].) The residence of an unmarried minor child is generally the residence of the parent with whom the child maintains his or her place of abode. (§ 68062, subds. (f)-(i).) This includes an unmarried minor alien, unless the child or parent is precluded by the Immigration and Nationality Act (8 U.S.C. § 1101, et seq.) from establishing United States domicile. (§ 68062, subds. (h)-(i).)

A "resident" is "a student who has residence, pursuant to [section 68062] in the state for more than one year immediately preceding the residence determination date." (§ 68017.) A "nonresident" is a student who does not have residence in the state for more than one year preceding the determination date. (§ 68018.)

"A student classified as a nonresident shall be required, except as otherwise provided in this part, to pay, in addition to other fees required by the institution, nonresident tuition." (§ 68050.) The governing board shall adopt rules and regulations relating to the method of calculation of the amount of nonresident tuition, unless otherwise provided by law. (§ 68051.) Section 68052 (which does not apply to community colleges) states that, under no circumstance

shall the level of nonresident tuition plus required fees fall below the marginal cost of instruction, unless state revenues and expenditures are substantially imbalanced due to unforeseen factors. (§ 68052.) At CSU, "Except as otherwise specially provided, an admission fee and rate of tuition fixed by the trustees shall be required of each nonresident student. The rate of tuition to be paid by each nonresident student . . . shall not be less that three hundred sixty dollars ($360) per year. The rate of tuition paid by each nonresident student who is a citizen and resident of a foreign country and not a citizen of the United States, except as otherwise specifically provided, shall be fixed by the trustees and shall not be less than . . . ($360) per year." (§ 89705.) The trustees may waive or reduce the fees of foreign citizens subject to limitations. (§§ 89705-89707.) Community college districts may exempt from nonresident tuition: Students taking six or fewer units, a limited number of citizen-residents of foreign countries with financial need, and students displaced by Hurricane Katrina. (§ 76140.)

Numerous exceptions to nonresident status exist – e.g., a student who remains in California after the parent has moved elsewhere (§ 68070); a self-supporting student actually present in California for more than a year with intention of acquiring residence (§ 68071); a student under the care of adults domiciled in California (§ 68073); a member of or a dependent of a member of the armed forces of the United States stationed in California on active duty (§§ 68074-68075); a graduate of a California school

operated by the United States Bureau of Indian Affairs (§§ 68077, 68082); and amateur student athletes training in Chula Vista for the Olympics (§ 68083). Some exceptions to residence determinations are left to the discretion of the school's governing board, e.g., a state employee or child of such employee "may be entitled to resident classification, as determined by the governing boards, until he or she has resided in the state the minimum time necessary to become a resident" (§ 68079), and agricultural laborers and their dependent children may be classified as residents for community college purposes if labor was performed in California for at least two months per year in the preceding two years (§ 68100). Additionally, tuition and fees are excused at particular institutions for various persons, including the surviving spouse or child of a law enforcement officer or firefighter killed in the line of duty while a California resident (§ 68120), surviving dependents of California residents killed in the September 11, 2001, terrorist attacks (§ 68121).

Defendants argue the plain language of section 68130.5, on its face, does not condition the exemption from nonresident tuition on the basis of residence. However, the question is whether the statute confers a benefit on the basis of residence, not whether the statute admits such a benefit is being conferred.

Section 68130.5, footnote 1, *ante,* allows illegal aliens to pay resident tuition for college (beginning with the 2001-2002 academic year) if they attended a California high school for three years and either

graduated from a California high school or attained "the equivalent thereof." (Arguably, a high school diploma from a state other than California would be "equivalent" to graduation from a California high school, but for purposes of this appeal, it does not matter.)

The statute purports to impose other conditions, i.e., (1) an affidavit promising to apply for legalized status if the student ever becomes eligible for such status, and (2) enrollment at an accredited institution of higher education not earlier than the fall of 2001. However, these supposed conditions add nothing. Enrollment is necessarily a prerequisite to having to pay tuition at all. And, despite defendants' assertion that section 68130.5 requires students to take steps to legalize their status, the statute does not do so. It merely requires students to promise to take steps to legalize their status if they ever become eligible for legalization. This is an empty, unenforceable promise contingent upon some future eligibility that may or may not ever occur.

Indeed, the "condition" of attaining a California high school diploma or its equivalent does not add much, because it would seem such diploma or equivalent would generally precede admission to a California college or university regular program. (See e.g., § 76000 [CCC]; Cal.Code Regs., tit. 5, § 40751 et seq. [CSU].) Nevertheless, we will consider the diploma/equivalency a condition of in-state tuition under section 68130.5.

Thus, the only real conditions imposed by section 68130.5 are that the student (1) attend a California high school for three years, and (2) graduate or attain the equivalent.

A reasonable person would assume that a person attending a California high school for three years also lives in California. Such an assumption would be reasonable, given that a school district is generally linked to residence. Thus, section 48200 states, "Each person between the ages of 6 and 18 years not exempted . . . is subject to compulsory full-time education. Each person subject to compulsory full-time education [and not exempted] . . . shall attend the public full-time day school or continuation school or classes . . . of the school district in which the residency of either the parent or legal guardian is located. . . ." This statute "embodies the general rule that parental residence dictates a pupil's proper school district." (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 57, 11 Cal.Rptr.3d 546 [under § 48200, which tied school district enrollment to parental residence, district was required to enroll pupils residing at property, even though property was located only partly within the district's geographic boundaries].)

We therefore consider the language of section 68130.5 ambiguous as to whether it affords a benefit to illegal aliens based on residence.

Defendants argue section 68130.5 is not based on residence, because other statutes allow non-California residents (children from adjoining states or an adjoining country) to attend school in California. (§§ 48050-48051.) However, those statutes require the parents or the other state to reimburse the California school district for the total cost of educating the pupil. Thus, section 48050[16] authorizes a school district to admit as pupils to an elementary school or a high school, children living in an adjoining state, as long as an agreement is reached for the school district of the other state to reimburse the California school district for the entire cost of educating the pupil.

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[16] Section 48050 provides: "The governing board of any school district may, with the approval of the county superintendent of schools, admit to the elementary and high schools of the district pupils living in an adjoining state which is contiguous to the school district. An agreement shall be entered into between the governing board and the governing board or authority of the school district in which the pupils reside providing for the payment by the latter of an amount sufficient to reimburse the district of attendance for the total cost of educating the pupil, including the total of the amounts expended per pupil for the current expenses of education, the use of buildings and equipment, the repayment of local bonds and interest payments and state building loan funds, capital outlay, and transportation to and from school. . . . The attendance of the pupils shall not be included in computing the average daily attendance of the class or school for the purpose of obtaining apportionment of state funds. In lieu of entering an agreement with the governing board or authority of the school district in which the pupil from the adjoining state resides, the governing board of the school district in this state may enter an agreement with the parent or guardian of the pupil on the same terms as is provided in this section."

Section 48051[17] authorizes residents of an adjoining foreign country (i.e., Mexico) to attend school in California, as long as they return home to Mexico every day, and as long as their parents or guardians reimburse the district for the cost of educating the person as provided in section 48052.[18]

We reject defendants' reliance on these statutes. Defendants ask us to believe that the Legislature enacted section 68130.5 to subsidize the college

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[17] Section 48051 provides: "Any person, otherwise eligible for admission to any class or school of a school district of this state, whose parents are or are not citizens of the United States, whose actual and legal residence is in a foreign country adjacent to this state, and who regularly returns within a 24-hour period to said foreign country may be admitted to the class or school of the district by the governing board of the district."

[18] Section 48052 provides: "The governing board of the district shall, as a condition precedent to the admission of any person, under Section 48051, require the parent or guardian of such person to pay to the district an amount not more than sufficient to reimburse the district for the total cost of educating the person, inc[l]uding the total of the amounts expended per pupil for the current expenses of education, the use of buildings and equipment, the repayment of local bonds and interest payments and state building loan funds, capital outlay, and transportation to and from school. . . . The attendance of the pupils shall not be included in computing the average daily attendance of the class or school for the purpose of obtaining apportionment of state funds. The school district shall not be eligible for nonimmigrant or noncitizen reimbursement under the provisions of Chapter 11 (commencing with Section 42900) of Part 24 of Division 3 of this title, Article 2 (commencing with Section 56865) of Chapter 6 of Part 30 of this division for these students."

education of students who were not entitled to free or subsidized education in California's elementary/secondary schools. That makes no sense.

Along the same lines, defendants argue section 68130.5 does not benefit only illegal aliens, because the statute gives in-state tuition to students who are *not* illegal aliens. Examples include a U.S. citizen who attended high school in California but lived in another state after high school before enrolling in a California college/university; such a person would not be considered a California resident unless he or she has resided in California for at least one year before the residence determination date. (§§ 68017-68018.) However, it could also be said such a student receives the benefit of section 68130.5 based on prior California residence. Other examples given by defendants are (1) a student who attended boarding school in California while maintaining a residence in another state; (2) a minor financially dependent on parents who reside in another state (since a minor's residence is derived from that of his or her parents); (3) a lawful immigrant dependent student whose parents have returned to another country; and (4) an "undocumented" student whose parents were granted permanent residency through an amnesty program and who is awaiting acceptance of his or her own application for permanent residency.

However, even assuming these examples involve persons lawfully present in this country, the circumstance that section 68130.5 may benefit some people who are not illegal aliens does not save the statute

from plaintiffs' preemption claims if the statute benefits illegal aliens in contravention of federal law. Moreover, we suspect, and a liberal construction of plaintiffs' complaint is that plaintiffs allege, the vast majority of students attending California high schools for three years live in California. Indeed, an Enrolled Bill Report of the Office of the Secretary For Education (which is part of the record on appeal and which is subject to judicial notice under *Kaufman, supra,* 133 Cal.App.4th at pp. 40-42, 34 Cal.Rptr.3d 520) estimated that 5,000 to 6,000 "undocumented" students would qualify for section 68130.5's exemption from nonresident tuition, while "the number of boarding school and border area students in California who are expected to qualify for a nonresident tuition exemption under the provisions of this bill [AB 540] is expected to be *less than 500.*"[19] (Enrolled Bill Report on Assem. Bill No. 540, Off. of the Sec. for Ed. (2001-2002 Reg. Sess.) Oct. 3, 2001, p. 5, italics added.) Since this case comes to us at the demurrer stage, we do not refer to these figures as proven facts but merely observe that, if true, they would undermine defendants' insinuation that the statute was not designed to benefit illegal aliens.

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[19] The amicus curiae brief supporting defendants, filed by Alicia A. et al., asserts that in 2005-2006, 1,500 UC students qualified for section 68130.5 in-state tuition, of which only 390 students were undocumented. Plaintiffs assert the total number of illegal aliens paying in-state tuition throughout the college and university systems is over 25,000. We need not resolve factual disputes at this demurrer stage.

The wording of the California statute, requiring attendance at a California high school for three or more years, creates a de facto residence requirement. Or, as plaintiffs put it, if section 68130.5 requires an illegal alien to attend a California high school for three years in order to qualify for the exemption from nonresident tuition, then the state has effectively established a surrogate criterion for residence.[20] That section 68130.5 also incidentally benefits a few students other than resident illegal aliens is, in our view, irrelevant. Section 68130.5 manifestly thwarts the will of Congress expressed in title 8 U.S.C. section 1623, that illegal aliens who are residents of a state not receive a postsecondary education benefit that is not available to citizens of the United States. Thus, we reject defendants' reliance on the presumption of constitutionality of legislation. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086, 17 Cal.Rptr.3d 225, 95 P.3d 459.)

Defendants argue the Legislature expressly stated, in an uncodified section of the bill enacting section 68130.5: "This act, as enacted during the 2001-02 Regular Session, does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United

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[20] We ask the same question that we posed to defendants' counsel at oral argument: "Could the Legislature enact a statute granting in-state tuition to every illegal alien whose parents maintained a post office box in California, without violating title 8 U.S.C. section 1623?" We think the answer is, "No."

States Code." (Stats.2001, ch. 814, § 1.) Defendants cite *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 63 Cal.Rptr.2d 467, 936 P.2d 473, which said, "courts must give legislative findings great weight and should uphold them unless unreasonable or arbitrary. . . ." (*Id.* at p. 569, 63 Cal.Rptr.2d 467, 936 P.2d 473.) However, the Legislature's statement in this case was not a finding of fact, but a legal conclusion. As defendants acknowledge, the Legislature's interpretation is not dispositive. Indeed, the cited case also said in the same paragraph that "the deference afforded to legislative findings does 'not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law.'" (*Id.* at p. 569, 63 Cal.Rptr.2d 467, 936 P.2d 473.) Ultimately, statutory interpretation is a judicial function. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244, 62 Cal.Rptr.2d 243, 933 P.2d 507.)

Moreover, the remainder of the uncodified section reflects an intent to benefit illegal aliens living in California:

"(a) The Legislature hereby finds and declares all of the following:

"(1) There are high school pupils who have attended elementary and secondary schools in this state for most of their lives *and who are likely to remain,* but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates.

"(2) These pupils have already proven their academic eligibility and merit by being accepted into our state's colleges and universities.

"(3) A fair tuition policy for all high school pupils *in California* ensures access to our state's colleges and universities, and thereby increases the state's collective productivity and economic growth.[21]

"(4) This act, as enacted during the 2001-02 Regular Session, allows all persons, *including undocumented immigrant* students who meet the requirements set forth in Section 68130.5 of the Education Code, to be exempt from nonresident tuition in California's colleges and universities.

"(5) [Statement that the statute does not confer benefits based on residence.]

"(b) It is the intent of the Legislature that:

"(1) A state court may award only prospective injunctive and declaratory relief to a party in any lawsuit interpreting Section 68130.5. . . .

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[21] The parties dispute whether, and to what extent, this policy applies to illegal aliens unable to obtain lawful, gainful jobs in California. *Kirk v. Regents of University of California*, *supra*, 273 Cal.App.2d 430, 78 Cal.Rptr. 260, said the State has a valid interest in providing tuition benefits "to those who have demonstrated by . . . residence a bona fide intention of remaining here and who, by reason of that education, will be prepared to make a greater contribution to the state's economy and future." (*Id.* at p. 444, 78 Cal.Rptr. 260.) However, *Kirk* did not involve illegal aliens.

"(2) This act will have no impact on the ability of California's public colleges and universities to assess nonresident tuition on students who are not within the scope of this act." (Stats.2001, ch. 814, § 1, italics added.)

A 2002 amendment deleted subdivision (b)(1) of the uncodified section, regarding remedy, and added codified section 68130.7: "If a state court finds that Section 68130.5, or any similar provision adopted by the Regents of the University of California, is unlawful, the court may order, as equitable relief, that the administering entity that is the subject of the lawsuit terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or other retroactive relief, may be awarded. In any action in which the court finds that Section 68130.5, or any similar provision adopted by the Regents of the University of California, is unlawful, the California Community Colleges, the California State University, and the University of California are immune from the imposition of any award of money damages, tuition refund or waiver, or other retroactive relief." (Stats.2002, ch. 19, §§ 1-2.)

That section 68130.5 was enacted to benefit illegal aliens living in California is also apparent in the cognizable legislative history of section 68130.5, which includes references to prior attempts at similar legislation. We disregard plaintiffs' citation of newspaper articles attributing statements to legislators. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1065, 31 Cal.Rptr.2d 358, 875 P.2d 73

[existence of newspaper article was irrelevant, and truth of its contents was not judicially noticeable].) We disregard plaintiffs' citation of a letter from James E. Holst, General Counsel to the UC Regents, because the trial court denied judicial notice of this letter (Exhibit O to RJN) due to lack of evidence it was considered by the Legislature, and we have rejected plaintiffs' challenge to this ruling. We shall consider the following legislative history that was the subject of judicial notice by the trial court.

Thus, the Higher Education Committee Analysis of Assembly Bill No. 540 (which became section 68130.5) summarized the bill as follows: "Qualifies long-term California *residents,* as specified, regardless of citizenship status, for lower 'resident' fee payments at the [CCC] and the [CSU]." (Concurrence in Sen. Amends., Assem. Bill No. 540 (2001-2002 Reg. Sess.) as amended Sept. 7, 2001, p. 1, italics added, cited by the parties as Higher Education Com. Analysis.) The same summary appears elsewhere in the legislative history. (Sen. Rules Com., Off. of Sen. Floor Analyses, Assem. Bill No. 540 (2001-2002 Reg. Sess.) Sept. 7, 2001, p. 1.) This description, which admits an intent to benefit residents, is telling. Defendants' assertion – that the summary merely illustrates the common understanding that most California high school graduates reside in the state – does not help defendants' position.

We disagree, however, with plaintiffs' further, unnecessary assertion that the legislative analysis indicated the majority of students to be benefitted

consider California their home. What the analysis said was, "According to the author, many of the students that would benefit under this measure are children of parents who have been granted amnesty by the federal government and are waiting for their own applications for citizenship to be accepted by the Immigration and Naturalization Service [INS]. The majority of these students consider California their home and are expected to become citizens." (Concurrence in Sen. Amends., Assem. Bill No. 540, *supra,* at p. 3.) Thus, the analysis referred to a majority of a specific class – children of parents who have amnesty.

The analysis also said:

"Previous legislation: This measure is similar to AB 1197 (Firebaugh) of 1999 which was passed by the Committee on Higher Education, Assembly, and Senate, but vetoed by the Governor. AB 1197 had a provision requiring the students to be in the process of obtaining citizenship in order to benefit from the in-state tuition. This is not a part of the current legislation.

"In his veto message, Governor Davis cited the [IIRIRA], by which undocumented aliens are ineligible to receive postsecondary education benefits based on state residence unless a citizen or national of the U.S. would be eligible for the same benefits without

regard to their residence ([title 8 U.S.C.] Section 1623).[22]

"In response to the veto message, the Chief Legislative Counsel issued an opinion that AB 1197 did not violate federal law since it did not tamper with a student's residency status under federal law and because it excluded from out-of-state tuition exemptions foreign students as specified in the United States Code." (Concurrence in Sen. Amends., Assem. Bill No. 540, *supra,* at pp. 3-4.)

Thus, the bill which became section 68130.5 was a second attempt to overcome a perceived conflict with federal law. Yet the content of section 68130.5 is not significantly different from the content of Assembly Bill No. 1197, which would have granted in-state tuition if the student (1) attended a California high school for at least three years; (2) graduated from a California high school; (3) enrolled in college within one year of high school graduation or on or before

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[22] The trial court sustained a defense objection to the complaint's Exhibit D: legislative history of the prior bill, which included the contents of the Governor's veto message expressing the view that the prior bill (which contained substantially the same language that was later enacted) would conflict with federal law unless the state gave the same benefit to out-of-state residents. The trial court said there was no evidence that the contents of the veto message of the prior bill was before the Legislature when it enacted section 68130.5 in Assembly Bill No. 540. However, the above-quoted language from the legislative history of Assembly Bill No. 540 adequately conveyed the contents of the veto message concerning the prior bill.

January 1, 2001; and (4) initiated an application to legalize his or her immigration status. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading of Assem. Bill No. 1197 (1999-2000 Reg. Sess.) as amended Jan. 4, 2000, p. 2.) Defendants say, without citation, that the later bill omitted a provision in the earlier bill expressly making eligible those aliens precluded from establishing California residency by section 68062.

Also consistent with our interpretation of section 68130.5 (though not cognizable legislative history of intent at the time section 68130.5 was enacted) is the legislative history of subsequently-enacted section 68130.7 (fn. 6, *ante*), limiting defendants' legal exposure. A Senate Rules Committee analysis of Assembly Bill No. 1543 (which became § 68130.7) stated, "Current law (AB 540, Firebaugh and Maldonado, Chapter 814, Statutes of 2001), which took effect January 1, 2002, qualifies specified long-term *California residents,* regardless of citizenship status, for lower 'resident' fee payments. . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading of Assem. Bill No. 1543 (2001-2002 Reg. Sess.) as amended Jan. 24, 2002, p. 1, italics added.)

We conclude section 68130.5 does, and was intended to, benefit illegal aliens on the basis of residence in California.

3. *Section 68130.5 is Preempted by Title 8 U.S.C. Section 1623*

Since California does not afford the same benefit to U.S. citizens from other states "without regard to" California residence, section 68130.5 conflicts with title 8 U.S.C. section 1623, which states, "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."

As indicated, state law is preempted to the extent that it actually conflicts with federal law, where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*English v. General Electric Co., supra,* 496 U.S. at pp. 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65, 74; *De Canas v. Bica, supra,* 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43; *LULAC II, supra,* 997 F.Supp. at p. 1253.)

Section 68130.5 does not regulate immigration and therefore is not expressly preempted as a regulation of immigration. (*De Canas v. Bica, supra,* 424 U.S. at p. 356, 96 S.Ct. 933.)

However, Congress in title 8 U.S.C. section 1623 expressly limited the state's power to give in-state

tuition to illegal aliens, and in that sense Congress manifested a clear purpose to oust state power with respect to the subject matter which the state statute attempts to regulate. (*Id.* at p. 357, 96 S.Ct. 933.) Though not binding on us, we observe that a federal district court concluded with respect to title 8 U.S.C. section 1621 (fn. 8, *ante*), which we discuss *post,* that Congress has occupied the field of regulation of public postsecondary education benefits to aliens (and thus invalidated portions of California initiative measure Proposition 187). (*LULAC II, supra,* 997 F.Supp. at p. 1256.) The *LULAC* cases concluded that some provisions (i.e., requiring college admissions officers to report students suspected of being in the country illegally) were preempted because they amounted to determinations of who may and may not remain in this country (*LULAC I, supra,* 908 F.Supp. at p. 774), while other provisions (e.g., denying public postsecondary education to illegal aliens) were preempted because Congress had occupied the field of regulation of public postsecondary education (*LULAC II, supra,* 997 F.Supp. at p. 1256).

It is impossible *for defendants* to comply with both state and federal requirements, because section 68130.5 conflicts with title 8 U.S.C. section 1623, in that the state statute allows the benefit to U.S. citizens from other states only if they attend a California high school for three years. Thus, the state statute does not afford the same benefit to U.S. citizens "without regard to" California residence, as required by title 8 U.S.C. section 1623.

Plaintiffs argue it is also impossible *for illegal aliens* to enjoy the benefits of section 68130.5 while complying with federal law. If they attend a California public university/college, they remain unlawfully present in the United States in violation of federal immigration law. "Federal law forbids aliens to enter the United States without applying for admission. (8 U.S.C. §§ 1101(a)(4), 1181(a), 1201.) Those who nonetheless succeed in doing so, or in overstaying their visas, are subject to arrest and deportation. (*Id.*, §§ 1251, 1252, 1357.)" (*Bradford, supra,* 225 Cal.App.3d at p. 979, 276 Cal.Rptr. 197.) Defendants respond that a finding of impossibility would preempt *all* legislation conferring *any* benefits on illegal immigrants, even emergency medical care. Defendants cite *Lozano v. City of Hazleton* (M.D.Pa.2007) 496 F.Supp.2d 477 at page 498, as stating the single illegal act of entering this country without legal authorization does not strip individuals of all rights. We question plaintiffs' claim that the federal appellate court granted review. In any event, the case does not help defendants because title 8 U.S.C. section 1623 expressly forbids the particular right at issue in this case unless it is given to U.S. citizens without regard to residence (which section 68130.5 does not do).

Plaintiffs add that encouraging illegal aliens to stay in the United States is a potential criminal violation. (8 U.S.C. § 1324(a)(1)(A)(iv); *United States v. Oloyede* (4th Cir.1992) 982 F.2d 133, 137; *Incalza v. Fendi* (9th Cir.2007) 479 F.3d 1005, 1009-1010 [8 U.S.C.

§ 1324a(a)(2), forbidding employers from knowingly employing illegal aliens, provides good cause for terminating employment, as defined by California labor law].) We presume for purposes of this appeal that title 8 U.S.C. section 1324 would not apply if section 68130.5 comported with title 8 U.S.C. sections 1621 and 1623.

Section 68130.5 also falls within the principle of implied preemption in that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*De Canas v. Bica, supra,* 424 U.S. at p. 357, 96 S.Ct. 933.) The Congressional objective was stated in title 8 U.S.C. section 1601:

"The Congress makes the following statements concerning national policy with respect to welfare and immigration:

"(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.

"(2) It continues to be the immigration policy of the United States that – [¶] (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and [¶] (B) the availability of public benefits not constitute an incentive for immigration to the United States.

"[¶] . . . [¶]

"(6) It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits."

Defendants quote from *Day v. Bond* (10th Cir.2007) 500 F.3d 1127 (*Day I*), where the court stated – in the course of concluding out-of-state students lacked standing for an equal protection claim – that a Kansas statute (with language similar to the California statute) involved "a nondiscriminatory prerequisite for benefits under [the statute], regardless of citizenship of the students." (*Id.* at p. 1135.) That statement does not help defendants on the issues of preemption and residence. Nor is defendants' position assisted by their assertion that nine states other than California (Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, Washington) have statutes similar to section 68130.5.

Defendants cite case law holding federal law did *not* preempt state statutes. (*Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 617-618, 56 Cal.Rptr.3d 68 [federal immigration law did not preempt state prevailing wage law or statutes making immigration status irrelevant to liability under labor, housing, and civil rights laws]; *Farmers Bros. Coffee v. Workers' Compensation Appeals Bd.* (2005) 133 Cal.App.4th 533, 540, 35 Cal.Rptr.3d 23 [federal immigration law did not preempt workers' compensation law].) However, those cases indicated the state statutes – which were designed for purposes such as discouraging unscrupulous employers from hiring illegal aliens – were

consistent with the ultimate goal of federal immigration law to control illegal immigration. (*Reyes, supra,* 148 Cal.App.4th at pp. 617-618, 56 Cal.Rptr.3d 68; *Farmers, supra,* 133 Cal.App.4th at p. 540, 35 Cal.Rptr.3d 23.) The same cannot be said of section 68130.5.

Defendants argue our interpretation (that section 68130.5 conflicts with title 8 U.S.C. section 1623) effectively deletes from the federal statute the phrase "on the basis of residence within a State," thereby violating the principle of statutory construction to give effect to every word. To the contrary, our conclusion gives realistic effect to that phrase in the federal statute, resulting in preemption of the state statute which confers a benefit on the basis of residence.

Defendants cite a law review article that undocumented children are caught in a fierce and complicated debate; the federal government does little to deport them; and it makes little sense to maintain obstacles to their pursuit of a college education. These policy arguments are beyond the scope of this court's authority in this appeal. Such arguments should be directed to Congress.

We conclude plaintiffs have stated a viable claim that title 8 U.S.C. section 1623 preempts section 68130.5. Although this conclusion suffices to require reversal of the judgment, we consider the parties' other contentions to determine what other claims will be at issue upon remand.

C. Preemption by Title 8 U.S.C. Section 1621

Plaintiffs argue section 68130.5 is also preempted by title 8 U.S.C. section 1621. We agree they stated a viable claim.

As indicated, title 8 U.S.C. section 1621 (fn. 8, *ante*) provides in part: "(a) In general. Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an [illegal alien] is not eligible for any State or local public benefit (as defined in subsection (c) of this section) . . . [¶] (c) . . . 'State or local public benefit' means [¶] . . . [¶] (B) any . . . postsecondary education . . . benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government. [¶] . . . [¶] (d) . . . A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after [August 22, 1996], which affirmatively provides for such eligibility."

Title 8 U.S.C. section 1621 was enacted in August 1996 (shortly before title 8 U.S.C. section 1623) as part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRA or PRWORA). (Pub.L. 104-193, (Aug. 22, 1996) § 411, 110 Stat. 2268.)

As indicated, a federal district court has held that the PRA preempted portions of California initiative measure Proposition 187 denying certain services to illegal aliens, including provisions that excluded illegal aliens from public schools (elementary/secondary and postsecondary) and a provision requiring denial of public postsecondary education benefits to illegal aliens. (*LULAC II, supra,* 997 F.Supp. 1244; *LULAC I, supra,* 908 F.Supp. 755.)

As we have explained in our discussion of title 8 U.S.C. section 1621, "benefit" in title 8 U.S.C. section 1621 includes exemption from nonresident tuition.

Title 8 U.S.C. section 1621 expressly preempts states from giving postsecondary education benefits to illegal aliens – unless the state enacts a statute which "affirmatively provides" for such eligibility. The parties refer to this as a "savings clause" or "safe harbor." The existence of a savings clause in federal legislation does not necessarily preclude a conclusion of conflict preemption. (*Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 926, 12 Cal.Rptr.3d 262, 88 P.3d 1.) However, to the extent the federal law expressly authorizes state legislation, Congress cannot have intended impliedly to preclude such action. (*People v. Edward D. Jones & Co.* (2007) 154 Cal.App.4th 627, 639, 65 Cal.Rptr.3d 130.)

What is the meaning of "affirmatively provides"? Plaintiffs argue it means the California Legislature must expressly refer to title 8 U.S.C. section 1621 and

illegal aliens; otherwise, the word "affirmatively" is superfluous. Defendants argue "affirmatively" merely means explicitly rather than implicitly; no "magic words" are required; and section 68130.5 affirmatively provides for eligibility by referring to "person[s] without lawful immigration status." We agree with plaintiffs that something more is required.

Since "affirmatively provides" is ambiguous, we refer to the cognizable federal legislative history – a conference report which stated, "Only the affirmative enactment of a law by a State legislature and signed by the Governor after the date of enactment of this Act, that references this provision [title 8 U.S.C. section 1621], will meet the requirements of this section. The phrase 'affirmatively provides for such eligibility' means that the State law enacted must specify that illegal aliens are eligible for State or local benefits." (H.R.Rep. No. 104-725, 2nd Sess., p. 1 (1996).)

We conclude the conference report supports plaintiffs' position that not only must the state law specify that illegal aliens are eligible, but the state Legislature must also expressly reference title 8 U.S.C. section 1621 (which was not done in the case of section 68130.5).

We agree with plaintiffs that the federal law's requirements are not a trivial formality. The federal law forces any state that is contemplating the provision of benefits to illegal aliens to spell out that intent publicly and explicitly. Doing so places the public on

notice that their tax dollars are being used to support illegal aliens. It is a matter of democratic accountability, forcing state legislators to take public responsibility for their actions.

Here, the California Legislature in enacting section 68130.5 did not expressly reference title 8 U.S.C. section 1621. Moreover, even accepting defendants' view that "affirmatively" merely means explicitly rather than implicitly and does not require the statute to use the words "illegal aliens," section 68130.5 does its best to conceal the benefit to illegal aliens. Although section 68130.5 does indicate that illegal aliens are eligible, it does so in a convoluted manner. The statute starts out by saying a student "other than a nonimmigrant alien [as defined under federal law]" is exempt from nonresident tuition. This sounds like the California statute does not benefit aliens. Section 68130.5 then says that a person "without lawful immigration status" must swear he or she has filed an application to legalize his/her immigration status or will file "as soon as he or she is eligible to do so." This almost sounds like the student will become legalized. The reality, in contrast, is that it could very well be that these students will never be eligible for legal status. Thus, while we do not hold that title 8 U.S.C. section 1621 requires the state statute to use the words "illegal aliens," we conclude the language of section 68130.5 does not clearly put the public on notice that tax dollars are being used to benefit illegal aliens.

Additionally, while the uncodified section of the enactment stated section 68130.5 allows "undocumented immigrant students" to be exempt from nonresident tuition, the same uncodified section went on to disavow any conferring of benefits on the basis of residence within the meaning of title 8 U.S.C. section 1623. (Stats.2001, ch. 814, § 1;[23] Stats.2002, ch. 19, § 1.)

We conclude the California Legislature has not met the requirements of title 8 U.S.C. section 1621's "safe harbor" or "savings clause." We need not address plaintiffs' further suggestion that "affirmatively provides" in title 8 U.S.C. section 1621 requires the state statute to use the words "illegal alien" or "alien who is not lawfully present in the United States."

Accordingly, plaintiffs have stated a cause of action that section 68130.5 is preempted by title 8 U.S.C. section 1621.

VI. *Equal Protection*

We next address whether plaintiffs stated a viable claim that section 68130.5 violates the Equal Protection Clause of the Fourteenth Amendment

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[23] The uncodified section stated the enactment "allows all persons, including undocumented immigrant students who meet the requirements" to be exempt from nonresident tuition, but also stated the enactment "does not confer postsecondary education benefits on the basis of residence within the meaning of [8 U.S.C. Section 1623]. . . ." (Stats.2001, ch. 814, § 1, (4)-(5).)

(count four) and the California Constitution (art. I, § 7) (count seven), by denying to plaintiffs the post-secondary education benefits granted to illegal aliens living in California. Plaintiffs claim they are similarly situated with the illegal aliens in that neither class is recognized under law as "domiciled" in the state of California, yet illegal aliens are allowed a benefit denied to U.S. citizens from sister states. We shall conclude plaintiffs should be allowed leave to amend regarding equal protection.

Even assuming for the sake of argument that strict scrutiny applies, as urged by plaintiffs, plaintiffs provide no legal analysis of the legal term of art "domicile," and section 68130.5 does not, on its face, allow illegal aliens a benefit denied to U.S. citizens from sister states. U.S. citizens, like illegal aliens, can obtain the benefit of section 68130.5 by attending a California high school for three years and obtaining a high school diploma or its equivalent.

We observe the high school attendance requirement of section 68130.5 is not troubling in and of itself, because a state may favor its own residents. "'[A] State has a legitimate interest in protecting and preserving . . . the right of its own bona fide residents to attend [its colleges and universities] on a preferential tuition basis.' [Citation.]" (*Martinez v. Bynum, supra,* 461 U.S. at pp. 327-328, 103 S.Ct. at p. 1842, 75 L.Ed.2d at p. 886, orig. brackets.) Although a state cannot exclude illegal aliens from free public elementary and secondary schools (*Plyler v. Doe, supra,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786), school

districts "may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of de facto residency, uniformly applied, would not violate any principle of equal protection.' [¶] A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. [Fn. omitted.]" (*Martinez v. Bynum, supra,* 461 U.S. at pp. 328-329, 103 S.Ct. at pp. 1842-1843, 75 L.Ed.2d at pp. 886-887.) Similarly, *Bradford, supra,* 225 Cal.App.3d at pages 980 through 981, 276 Cal.Rptr. 197, held there was no equal protection violation in section 68062, subdivision (h), which precluded illegal aliens from qualifying as California residents for tuition purposes. *Bradford, supra,* at pages 981 through 982, 276 Cal.Rptr. 197, observed the heart of *Plyler v. Doe, supra,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (requiring states to educate illegal aliens at the elementary and secondary school levels) was that the "stigma of illiteracy" would mark these children for the rest of their lives.

Plaintiffs claim they alleged that some California colleges/universities have implemented section 68130.5 to deny eligibility to all U.S. citizens. Defendants respond plaintiffs did not allege this "as applied" challenge in their complaint and may not do so for the

first time on appeal. However, plaintiffs, in their brief opposing the demurrer said: "Defendants argue that § 68130.5 withstands equal protection scrutiny because some U.S. citizens at some institutions of higher education have received benefits under the former [*sic*]." Plaintiffs added a footnote that, "Defendants are flatly wrong in arguing that there is no equal protection violation because in-state tuition benefits are being provided to certain non-resident U.S. citizens. By their own admission, Defendants are denying such benefits to non-resident U.S. citizens. [Citation to discovery response.] Evidence of this will be provided at trial."

The cited discovery response does not support the allegation. However, at the demurrer stage, plaintiffs are not required to prove their allegations. Plaintiffs should be allowed leave to amend if they show a reasonable possibility that defects can be cured by amendment. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 966-967, 9 Cal.Rptr.2d 92, 831 P.2d 317.)

We conclude that, on remand, the trial court shall give plaintiffs the opportunity to amend their complaint as to the equal protection claim. We need not address plaintiffs' argument that the state cannot have a rational basis for subsidizing the higher education of persons who by virtue of their illegal alien status may be unable to work legally in the state.

VII. *Privileges and Immunities*

Plaintiffs maintain their fifth count stated a viable claim that section 68130.5 contravenes the Privileges and Immunities Clause of the Fourteenth Amendment, Section One, which provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Plaintiffs' theory, as alleged in the complaint, was that, "By making illegal aliens who possess no lawful domicile in the state of California eligible for in-state tuition rates, while denying this benefit to U.S. citizens whose lawful domicile is outside California, the state of California has denigrated U.S. citizenship and placed U.S. citizen Plaintiffs in a legally disfavored position compared to that of illegal aliens." The complaint cited section 5 of the Fourteenth Amendment, which provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The complaint alleged Congress exercised this power by enacting title 8 U.S.C. section 1623.

The trial court dismissed this count based on *Kirk v. Regents, supra,* 273 Cal.App.2d 430, 78 Cal.Rptr. 260, which said, "the privileges and immunities clause does not guarantee [a student from Ohio who married a California resident and moved to California] the right to attend the university for the same fee as that charged to persons who have met the one-year residence requirement." (*Id.* at pp. 444-445, 78 Cal.Rptr. 260.)

Given the complaint's allegations, this reason is invalid.

That in-state tuition is conferred by state rather than federal law does not defeat the privileges and immunities claim here, where plantiffs allege a violation of their rights under federal law, 8 U.S.C. section 1623.

Defendants' response on this point is that section 68130.5 applies equally to U.S. citizens and illegal aliens. We have rejected this view in our discussion of preemption.

Accordingly, the demurrer should be overruled as to the privileges and immunities claim. We need not address plaintiffs' invocation of a different constitutional provision regarding privileges and immunities which was not alleged in the complaint.

VIII. *Due Process Taking of Property*

Plaintiffs contend defendants' illegal and discriminatory conduct operated as an illegal extraction of excessive tuition from plaintiffs and constituted a taking of property without due process of law under the federal and California Constitutions. No such claim was asserted in the complaint, and we see no reason for leave to amend.

Plaintiffs fail to show they could amend the complaint to add a viable takings claim. They cite authority for the general proposition that a plaintiff deprived of a property right without due process is

entitled to compensation under the Fourteenth Amendment and the California Constitution. Plaintiffs cite *Lister v. Hoover, supra,* 706 F.2d 796, for the supposed proposition that the right to lower tuition constituted a property interest. However, the only issue in *Lister* was whether due process required the University of Wisconsin to give written reasons for its denial of student requests to be classified as state residents for tuition purposes. (*Id.* at p. 797.) In *Lister,* no one disputed that the plaintiffs' claimed entitlement to lower tuition constituted a property interest; the question was what process was due. (*Id.* at p. 798.) The reviewing court said the interest was slight, and due process did not require the university to give written reasons for its denial. (*Id.* at pp. 797, 805.)

Plaintiffs' citation of authority that they have a contractual relationship with defendants adds nothing to their constitutional claims.

We conclude plaintiffs fail to show they should be given leave to amend to assert a due process claim based on the taking of their property.

IX. *Unruh Act*

Plaintiffs contend they adequately pleaded a claim under the Unruh Civil Rights Act (Civ.Code, § 51 et seq.), in that they are American citizens from states other than California who are being discriminated against on the basis of national origin (reverse discrimination) and geographic origin. We shall

conclude plaintiffs fail to show grounds for reversal regarding the Unruh Act claim.

Civil Code section 51, subdivision (b), provides: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

Section 68130.5 does not discriminate against plaintiffs on the basis of national origin. Plaintiffs are denied the exemption from nonresident tuition, *not* because they are U.S. citizens, but because they have not attended high school in California. However, plaintiffs claim the effect of section 68130.5 is reverse discrimination against U.S. citizens from states other than California (geographic origin) and in favor of illegal aliens.

The Unruh Act must be construed liberally to carry out its purpose of compelling recognition of the equality of all persons receiving services offered by business establishments. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167, 59 Cal.Rptr.3d 142, 158 P.3d 718.) Although Civil Code section 51 does not mention geographic origin, the enumerated categories in the Unruh Act are "'illustrative rather than restrictive.'" (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839, 31 Cal.Rptr.3d 565, 115 P.3d 1212.) Nevertheless, the enumerated

categories set forth the type of categories that will fall within the scope of the statute. (*Id.* at p. 841, 31 Cal.Rptr.3d 565, 115 P.3d 1212.) The common element of the enumerated categories and those added by judicial construction is they "'involve personal . . . characteristics – a person's geographic origin, physical attributes, and personal beliefs.'" (*Id.* at pp. 841, 842-843.) *Koebke* held the version of the Unruh Act in effect at that time extended to prohibit discrimination in favor of married couples and against domestic partners. (*Ibid.*) Thus, *Koebke* did not, as plaintiffs claim, extend the Unruh Act to geographic origin. Cases are not authority for propositions not decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620, 71 Cal.Rptr.2d 830, 951 P.2d 399.)

Plaintiffs' position finds indirect support in *Bradford, supra,* 225 Cal.App.3d 972, 276 Cal.Rptr. 197, which held – before enactment of section 68130.5 – that section 68082 (fn. 9, *ante*) precluded illegal aliens from qualifying as California residents for tuition purposes. (*Id.* at p. 980, 276 Cal.Rptr. 197.) Among the state's legitimate interests in denying resident tuition to illegal aliens was the interest "in avoiding discrimination against citizens of our sister states. . . ." (*Id.* at p. 981, 276 Cal.Rptr. 197.)

However, *Bradford* was not an Unruh Act case. We disregard plaintiffs' unsupported assertion, raised for the first time in the reply brief, that the doctrine of collateral estoppel bars defendants, who were parties in the *Bradford* case, from denying that discrimination has occurred.

Defendants argue the Unruh Act prohibits only "arbitrary discrimination," and defendants' actions in applying a statute (§ 68130.5) enacted by the Legislature cannot be considered arbitrary discrimination, since the Legislature has specifically permitted public colleges and universities to charge non-resident tuition and to exempt certain persons from the requirement of paying nonresident tuition.

Defendants have the better argument, particularly since section 68130.7 (fn. 6, *ante*) limits the remedy available in the event of invalidation of section 68130.5. The money damages available under the Unruh Act (Civ.Code, §§ 52, 52.1, subd. (b)) are barred by section 68130.7 (fn. 6, *ante*), which prohibits monetary damages if a court finds section 68130.5 unlawful.

We conclude plaintiffs fail to show grounds for reversal regarding the Unruh Act claim (count eight).

X. *Discrimination (Cal. Const., Art. I, § 31)*

Although not alleged in the complaint, plaintiffs claim they argued at the hearing on the demurrer (no transcript appears in the record on appeal) that they have a viable claim under California Constitution, article I, section 31, which was adopted by Proposition 209 in 1996, and which provides in part that "[t]he State [expressly including the public university system] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or *national*

origin in the operation of public employment, *public education,* or public contracting." (Italics added.) This self-executing provision states the remedies are the same as are otherwise available for violations of California antidiscrimination law. (Cal. Const., art. I, § 31, subds. (g)-(h).)

Plaintiffs argue illegal aliens who receive the in-state tuition benefit under section 68130.5 are by necessity foreign nationals, and therefore they receive preference based on their national origin. Plaintiffs also argue they themselves are the objects of reverse discrimination based on their national origin, i.e., American citizens from out-of-state.

However, plaintiffs fail to persuade us that "national origin" includes alienage/citizenship.[24]

Proposition 209 was intended to reinstitute in California an interpretation of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000a et seq.) that preference to any group constitutes inherent inequality, however it is rationalized. (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 561, 101 Cal.Rptr.2d 653, 12 P.3d 1068.) In interpreting title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), the United States Supreme Court

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[24] Even plaintiffs' amicus curiae, Pacific Legal Foundation (PLF) is not persuaded. PLF filed an amicus curiae brief in support of plaintiffs on other grounds but argued plaintiffs are wrong about article I, section 31, and national origin does not include citizenship.

concluded "national origin" did not include alienage/citizenship. (*Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 88, 94 S.Ct. 334, 336, 38 L.Ed.2d 287, 291.) "The term 'national origin' on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came." (*Ibid.*) "Congress did not intend the term 'national origin' to embrace citizenship requirements." (*Id.* at p. 89, 94 S.Ct. 334.) "Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin – for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." (*Id.* at p. 95, 94 S.Ct. 334.)

Plaintiffs cite federal cases allowing American citizens to pursue title VII claims alleging they were terminated from employment solely because they were born in the United States. However, plaintiffs fail to discuss these cases. None of these cases said "national origin" included alienage/citizenship, and none helps plaintiffs. Thus, the parties in *Chaiffetz v. Robertson Research Holding, Ltd.* (5th Cir.1986) 798 F.2d 731 – an American employee of a Texas subsidiary of a British parent corporation – agreed that "national origin" in title VII includes American citizens. (*Id.* at p. 732-733.) The appellate court held the district court erroneously found a legitimate, nondiscriminatory reason for the dismissal. (*Ibid.*) The

appellate court reversed on that ground but added that the district court did not need to consider on remand the plaintiff's equal protection claim under title 42 U.S.C. section 1981 because, although that statute covers alienage, in America discrimination against Americans can never be discrimination based on a alienage. (*Id.* at p. 735.) Plaintiffs do not discuss this latter point. *Bilka v. Pepe's Inc.* (N.D.Ill.1985) 601 F.Supp. 1254, held an employee could pursue a claim of national origin discrimination, where the American employee alleged he was fired for teaching the Mexican workers English and talking about unions, though the court expressed no view as to whether being fired for having "American ideas" was the same as being fired for being born American. (*Id.* at p. 1258, fn. 7.) *Thomas v. Rohner-Gehrig & Co.* (N.D.Ill.1984) 582 F.Supp. 669, held a complaint alleging that the plaintiffs were discharged by their employer (a Swiss-owned company incorporated in New York) solely because they were born in the United States, sufficiently stated a title VII cause of action based on national origin discrimination. (*Id.* at pp. 674-675.) Thus, none of these cases helps plaintiffs here.

We conclude plaintiffs fail to show a viable claim for violation of California Constitution, article I, section 31.

XI. *Injunctive and Declaratory Relief*

Plaintiffs summarily argue they adequately pleaded claims for injunctive and declaratory relief. Given our foregoing conclusions, we agree.

In summary, the demurrer was improperly sustained as to the preemption and privileges and immunities claims, and leave to amend should be granted as to the equal protection claim.

DISPOSITION

The judgment is reversed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

We concur: RAYE and HULL, JJ.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
COUNTY OF YOLO

ROBERT MARTINEZ, et al., Plaintiffs, vs. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et. al, Defendants.	Case No.: CV 05-2064 **ORDER ON DEMURRERS, MOTION TO STRIKE AND MOTIONS BY PROPOSED INTERVENORS** (Filed Oct. 4, 2006)

On Thursday, August 17, 2006, the court heard six motions filed in this matter: (1) the Regents of the University of California ("Regents") and Robert C. Dynes' demurrer to the complaint; (2) the Regents and Robert C. Dynes' motion to strike the request for tuition reimbursement; (3) the Trustees of the California State University System ("CSU"), the Board of Governors of the California Community Colleges ("Community Colleges Board"), Charles B. Reed and Marshall Drummond's demurrer to the complaint; (4) the plaintiffs Robert Martinez et al.'s request for judicial notice; (5) Alicia A., Mildred A., Enrique Boca, Nicole Doe, Collin Campbell, Alex Ortiz, Linda Lin Qian, Cesar Rivadeneyra, Jennifer Seidenberg, Improving Dreams, Equality, Access and Success at UC Davis ("IDEAS UC Davis"), and Improving Dreams, Equality, Access and Success of UCLA's ("IDEAS UCLA") motion for leave to intervene; and

(6) Alicia A., Mildred A., Enrique Boca, and Nicole Doe's motion to proceed under fictitious names. These motions were heard in Department Four.

Kris W. Kobach, Michael J. Brady and O. Antony Abdollahi appeared for the plaintiffs. Ethan P. Schulman and Christopher M. Patti appeared for the Regents and Robert C. Dynes. Julie Weng-Gutierrez appeared for the Community Colleges Board and Marshall Drummond. Andrea M. Gunn appeared for the CSU and Charles B. Reed. Robert Rubin Nicholas Espiritu and Daniel Levin appeared for the proposed intervenors.

Having considered all matters submitted in the papers and on oral argument, all admissible evidence, the file in this case and the applicable law, the court now rules as follows.

This case reflects the ongoing national debate concerning immigration policies, the roles undocumented aliens and their children play in our communities, and effective access to postsecondary education. The California Legislature debated such issues and passed Assembly Bill 540 in 2001. Governor Gray Davis signed the bill, which enacted Education Code section 68130.5.

At least nine other states have enacted similar legislation which entitles certain undocumented students to in-state tuition at public universities and colleges. Nevertheless, neither the United States Attorney General, the Secretary of Homeland Security, nor federal agencies including the Department of

Education and the U.S. Citizenship and Immigration Services (formerly the U.S. Immigration and Naturalization Service) has rendered any opinion on the issue of whether state laws like section 68130.5 violate federal laws.

The plaintiffs contend that section 68130.5 violates 8 U.S.C. §§ 1621 and 1623, 42 U.S.C. § 1983, the California Unruh Civil Rights Act, and the federal and State constitutions.

Education Code section 68130.5 exempts from the requirement of paying non-resident tuition those persons who can establish (a) high school attendance in California for three or more years, (b) graduation from a California high school or attainment of the equivalent thereof, (c) registration as an entering student, or current enrollment, at an accredited institution of higher education in California, not earlier than the fall semester or quarter of the 2001-2002 academic year, and (d) in the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

1. Plaintiffs' Request for Judicial Notice

Exhibits K through Z of the Request for Judicial Notice ("RJN") comply with the requirements of *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31.

The request for judicial notice of Exhibit F of the RJN is **DENIED**. Although the court may take judicial notice of the fact that Senator Simpson and Representative Smith filed an *amicus curiae* brief in the *Day v. Bonds* appeal (Tenth Circuit Court of Appeal Case No. 053305) and that Senator Simpson submitted a declaration in support of such brief, it is not proper for the court to take judicial notice of the truth of the matters asserted in the brief and the Simpson declaration. (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865.) The court does not assume the truth of contentions, deductions or conclusions of law whether such appear on the face of the pleading or exhibits thereto. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) For the same reasons, the evidentiary objections to the Declaration of Senator Simpson, which is Exhibit A to the Complaint, are **SUSTAINED**.

The request for judicial notice of Exhibits N, P and R-X of the RJN is **DENIED**. Letters to legislators or the governor expressing support for or opposition to a bill are not the proper subject of judicial notice, unless there is a showing that such letters were communicated to the Legislature as a whole. (*Kaufman & Broad, supra,* 133 Cal.App.4th at 38.) There has been no showing that Exhibits N, P and/or R-X of the RJN were presented to the entire Legislature.

The request for judicial notice of Exhibits G, H, I and J is **DENIED**. The plaintiffs failed to cite any case in which a court, in ruling on a demurrer, took judicial notice of a defendant's discovery responses.

The request for judicial notice of Exhibits O and Q is **DENIED**. There is no evidence that either of James E. Holst's letters to the Regents' board was considered by the Legislature as a whole. The cases the plaintiffs cite in support of their contention that Mr. Holst's letters constitute "official acts" are inapposite.

The request for judicial notice of the bill analysis for AB 540 prepared by the Assembly Committee on Higher Education in Exhibit Y, Tabs A.4 and A.11 and the Department of Finance bill analysis in Exhibit Y, Tab A.11 is **GRANTED**. (*So. Calif. Gas and Elec. Co. v. Public Utilities Commission* (1979) 24 Cal.3d 653, 659.)

The request for judicial notice of the other materials in Exhibit Y, Tabs A.4 and A.11 and all of the materials under Exhibit Y, Tabs A.6 and A.8 is **DENIED**. (*Kaufman & Broad, supra,* 133 Cal.App.4th at 38.)

The request for judicial notice of the materials in Exhibit Y, Tab A.13 is **DENIED**. (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 487, fn. 4.)

For the reasons stated above, the request for judicial notice as to Exhibit Y, Tab B is **DENIED** as to the materials under Tabs B.4, B.7, B.9, B.14, and B.15. Except as provided above, the request as to Exhibit Y, Tab B is **GRANTED**.

The evidentiary objections to Exhibits B and C to the Complaint are **OVERRULED**. It is proper for the court to take notice of the legislative history of a statute, including the legislative antecedents of a statute. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 571, fn. 9.) It is also proper for the court to consider statements in legislative committee reports. (*So. Calif. Gas and Elec. Co., supra,* 24 Cal.3d at 659.)

The evidentiary objection to Exhibit D to the Complaint is **SUSTAINED**. In *City of Richmond v. Comm. On State Mandates* (1998) 64 Cal.App.4th 1190, 1199, the court noted that a predecessor bill was vetoed by the governor, but the opinion did not state that the Court of Appeal took notice of the governor's veto message nor discuss the content of the governor's veto message. The plaintiffs did not direct the court's attention to any evidence in the voluminous papers they have filed which show that the Legislature considered the Governor's veto message.

2. Regents of the University of California and Robert C. Dynes' Demurrer

The demurrer to the first, second and sixth causes of action is **SUSTAINED WITHOUT LEAVE TO AMEND**. Education Code section 68130.5 is not preempted by federal immigration laws because (1) it does not regulate immigration; (2) there is no evidence that Congress intended to occupy the field of resident tuition rates that may be charged by state

universities and colleges; and (3) section 68130.5 does not conflict with 8 U.S.C. §§ 1621 and/or 1623.

Section 68130.5 does not regulate immigration because it does not determine who should or should not be admitted into the United States or the conditions under which an alien may remain in this country. Standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration. (*De Canas v. Bica* (1976) 424 U.S. 351, 355.) There has been no showing that the term "person without lawful immigration status" in subdivision (a)(4) of Section 68130.5 conflicts with or adds to federal immigration standards.

There has been no showing that Congress intended the Immigration and Naturalization Act or any other federal statute cited by the plaintiffs to occupy the field of determining resident tuition rates at state universities and community colleges. 8 U.S.C. §§ 1623 and 1621, subdivision (d) contemplate state regulation in this area.

Although section 68130.5 confers a "benefit" within the meaning of 8 U.S.C. § 1621 (8 U.S.C. § 1621, subd. (c)(1)(B); Exhibit A to Plaintiffs' Request for Judicial Notice, page 2; Exhibit Y to Plaintiffs' Request for Judicial Notice, Tab A.2, p. 2), the benefit conferred is permitted under subdivision (d) of 8 U.S.C. § 1621. Subdivision (d) of 8 U.S.C. § 1621 does not require a state statute to use the words "illegal alien" or to reference the federal statute.

Section 68130.5 does not conflict with 8 U.S.C. § 1623 because section 68130.5 does not confer a benefit based on residency within California. The requirement of high school attendance in California set forth in section 68130.5 does not require residency in California because non-California residents may attend high school in this State. (Educ. Code, §§ 48050-48051.) The plaintiffs fail to cite authority supporting their contention that mere physical presence, as opposed to living, in California is sufficient to establish residency.

The demurrer to the third cause of action is **OVERRULED** because the third cause of action is based on the alleged violation of 8 U.S.C. §§ 1621 and 1623, not federal preemption.

The demurrer to the fourth and seventh causes of action is **SUSTAINED WITHOUT LEAVE TO AMEND**. Initially, the court notes that none of the authorities cited in the papers show that a state may never, consistent with the equal protection and/or privileges and immunities clauses of the state and federal constitutions, charge non-resident tuition. (*Cf. Kirk v. The Bd. Of Regents of the Univ. of Calif.* (1969) 273 Cal.App.2d 430, 444-445.)

Section 68130.5 does not classify persons on the basis of alienage or residency. Nothing in the language of section 68130.5 supports the plaintiffs' contention that section 68130.5 discriminates against United States citizens based on their residency. If anything, subdivision (4) imposes a greater burden on

non-citizens by requiring certain aliens to submit additional evidence to qualify for an exemption from non-resident tuition. The plaintiffs do not allege that section 68130.5 discriminates against illegal aliens. (Opposition brief, p. 8, lines 7-8.) Additionally, none of the authorities cited in the papers show that United States citizens are a suspect class or that paying resident tuition rates is a fundamental right. For the reasons stated, the minimum rational relationship test applies to this case.

The goal of helping high school students who will likely remain in California, and presumably contribute to the State's economy, is a legitimate governmental purpose. (*Kirk v. The Bd. Of Regents of the Univ. of Calif., supra*, 273 Cal.App.2d at 444.) Section 68130.5 is rationally related to the State's valid interests. (Exhibit Y of Plaintiffs' Request for Judicial Notice, Tab A.1, p. 29.) *Nyquist v. Mauclet* (1977) 432 U.S. 1 is distinguishable because there is no evidence that the Legislature sought to promote immigration or naturalization when it enacted section 68130.5. There has also been no showing that section 68130.5 interferes with federal laws.

The demurrer to the fifth cause of action is **SUSTAINED WITHOUT LEAVE TO AMEND**. (*Kirk v. The Bd. Of Regents of the Univ. of Calif., supra*, 273 Cal.App.2d at 444-445.)

The demurrer to the eighth cause of action is **SUSTAINED WITHOUT LEAVE TO AMEND**.

Section 68130.5 does not constitute arbitrary discrimination under the Unruh Act. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1503-1504.) The Legislature has specifically permitted public universities and colleges to charge non-resident tuition (Educ. Code, §§ 68050-68052) and to exempt certain persons from the requirement of paying non-resident tuition (Educ. Code, § 68130.5). To the extent Section 68130.5 conflicts with the Unruh Act, section 68130.5 was more recently enacted and is a more specific statute than the Unruh Act. Further, Civil Code section 51, subdivision (c) provides that in the event of a conflict, the Unruh Act defers to the provisions of the statute with which it conflicts.

Because the court sustains the demurrers to the first through eighth causes of action in the *two* demurrers before it and the ninth and tenth causes of action are based entirely on the first through eighth causes of action, it is unnecessary for the court to rule on the demurrer to the ninth and tenth causes of action.[1]

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[1] Below, the court sustains without leave to amend the CSU, Community Colleges Board, Charles B. Reed and Marshall Drummond's demurrer to the third cause of action.

3. Trustees of the California State University System, Board of Governors of the California Community Colleges, Charles B. Reed and Marshall Drummond's Demurrer

The demurrer on the grounds of standing is **OVERRULED**. The defendants fail to cite authority for the proposition that Article III standing requirements apply to state courts. (*Cf. Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29.) The plaintiffs' allegation that Education Code section 68130.5 infringes on their constitutional and statutory rights is sufficient to establish standing to challenge section 68130.5. (*Holmes v. Calif. National Guard* (2001) 90 Cal.App.4th 297, 314-315.)

The first and second causes of action allege that section 68130.5 violates 8 U.S.C. §§ 1621 and 1623 (Complaint ¶¶ 94-95 and 111) and that Section 68130.5 is preempted by 8 U.S.C. §§ 1621 and 1623 (Complaint ¶¶ 97 and 109). The defendants concede that a private right of action need not exist to state a cause of action for preemption. This demurrer is limited to the issue of whether the plaintiffs have a private right of action to bring claims alleging violations of 8 U.S.C. §§ 1621 and 1623.

The demurrer to the first cause of action and the third cause of action to the extent it is based on a violation of 8 U.S.C. § 1623 is **SUSTAINED WITHOUT LEAVE TO AMEND**. The focus of 8 U.S.C. § 1623 is on the aggregate, rather than the individual. (8 U.S.C. § 1643, subd. (a)(1).) The language of the

statutes in Chapter 14 of Title 8 of the United States Code show that Congress intended illegal aliens to be the focus of 8 U.S.C. § 1623. (8 U.S.C. §§ 1601, 1611-1614, 1621-1623 and 1624.) Additionally, Congress designated the Secretary of Homeland Security, not private citizens, as the person in charge of enforcing immigration laws. (8 U.S.C. § 1103, subd. (a)(1).) Exhibit D of the plaintiffs' Request for Judicial Notice does not show that Congress intended to create a private right of action in either 8 U.S.C. § 1621 or § 1623.

The demurrer to the second cause of action and the third cause of action to the extent it is based on a violation of 8 U.S.C. § 1621 is **SUSTAINED WITHOUT LEAVE TO AMEND**. The language of 8 U.S.C. § 1621 does not evince legislative intent to confer any right or benefit on the plaintiffs. 8 U.S.C. § 1621 focuses on illegal aliens. The plaintiffs do not allege that they are illegal aliens. The plaintiffs allege that they are United States citizens. (Complaint ¶ 1.)

Because the court has sustained without leave to amend the demurrer of the Regents of the University of California and Robert C. Dynes, it is unnecessary to rule on the demurrer to the eighth cause of action and the demurrer as to the Board of Governors of the California Community Colleges and Marshall Drummond.

4. The Regents of the University of California and Robert C. Dynes' Motion to Strike

The court's ruling on the two demurrers before it makes it unnecessary to rule on this motion to strike.

5. Motion for Leave to Intervene

The motion to intervene as a matter of right under Code of Civil Procedure section 387, subdivision (b) is **DENIED**. Even if the proposed intervenors' burden is minimal, the proposed intervenors are still required to make some showing of inadequate representation. Besides conclusory allegations, the proposed intervenors have made no showing that the defendants may not adequately represent the proposed intervenors' interests. There is no evidence of any disagreement between the proposed intervenors and the defendants about the defense of this lawsuit. There is no evidence that the proposed intervenors would add anything new to the defense. There is also no evidence that the defendants are not capable or willing to represent the proposed intervenors' interests.

The defendants have a significant financial stake in defending Section 68130.5. (Complaint ¶¶ 175-179.) The defendants' vigorous defense in this matter cannot be denied. The proposed intervenors' contention that the defendants are not interested or capable of representing the interest of protecting access to higher education is unfounded. (*See* Regents of the University of California and Robert Dynes' demurrer, Opening brief, page 13, lines 14-16.)

The motion to intervene under Code of Civil Procedure section 387, subdivision (a) is **DENIED**. There has been no showing that the defendants' interests differ from the proposed intervenors' or that the defendants will not raise arguments that the proposed intervenors would raise. Allowing intervention would unduly extend the proceedings in this action. (*Continental Vinyl Prod. Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 552.)

The evidentiary objections to the declarations of Martin Lemus and Carol Montes are **OVERRULED**.

6. Motion to Proceed Under Fictitious Names

Because the court denies the motion for leave to intervene, it is unnecessary for the court to rule on the motion to allow certain intervenors to proceed under fictitious names. It is also unnecessary for the court to rule on the evidentiary objections to the declarations of Alicia A., Gloria A., Marcos A., Mildred Al., Enrique Boca, and Nicole Doe.

Dated: 10/2/06

/s/ Thomas E. Warriner
Hon. Thomas E. Warriner
Judge of the Superior Court

No. 10-1029

In The Supreme Court of the United States

ROBERT MARTINEZ, et al.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

BRIEF OF RESPONDENTS THE BOARD OF GOVERNORS OF THE CALIFORNIA COMMUNITY COLLEGES AND MARSHALL DRUMMOND IN OPPOSITION

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QUESTIONS PRESENTED

A federal statute, 8 U.S.C. § 1623, expressly authorizes the States to give a postsecondary education benefit to an undocumented immigrant based on residence within a state as long as a nonresident citizen is eligible for the same benefit.

The questions presented are:

1. Whether Congress preempted a California tuition law that allows California high school graduates, nonresident citizens and undocumented immigrants alike, to pay in-state tuition.

2. Whether a court has failed to conduct a conflict preemption analysis where it holds that there was no conflict between state and federal law and that Congress expressly authorized the conduct at issue.

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The unanimous California Supreme Court opinion is reported at 50 Cal. 4th 1277, 241 P.3d 855 (Cal. 2010). Pet. App. 1-37. Contrary to statements in the Petition, the opinion of the California Court of Appeal is unreported. Under California law, an opinion is no longer considered published if the California Supreme Court grants review. Cal. Rules of Court 8.1105(e). The Court of Appeal opinion was originally reported and certified for partial publication at 166 Cal. App. 4th 1121 (Ct. App. 2008). Pet. App. 38-109. The trial court opinion granting a demurrer without leave to amend is unreported. Pet. App. 110-123.

JURISDICTION

This Court lacks jurisdiction to review this case because petitioners lack Article III standing to challenge the California statute in this case.

STATUTES INVOLVED

The pertinent text of the statutes involved in this case is set out in the appendix to this brief.

STATEMENT OF THE CASE

1. A federal immigration law, 8 U.S.C. § 1621(a), generally, prohibits states from providing

public benefits to undocumented immigrants but then proceeds to identify exceptions for emergency medical care and disaster relief, immunizations, emergency shelter, soup kitchens, and crisis counseling. 8 U.S.C. § 1621(b).

In addition, Congress expressly permit states to provide local public benefits to undocumented immigrants if a state enacts a law after August 22, 1996, that affirmatively provides for such eligibility. 8 U.S.C. § 1621(d).

To the extent states provide postsecondary education benefits to an undocumented immigrant on the basis of residence within a state, Congress requires a state to ensure that a nonresident citizen would be eligible for the same benefit: "[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for the benefit . . . without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623.

2. Students at California's public colleges and universities pay varying amounts of tuition. Generally, California residents pay lower tuition than nonresidents. *See* Cal. Educ. Code § 68040. Students are classified either as residents, *id.* § 68017, in which case they are charged a lower resident tuition, or as nonresidents, *id.* § 68018, in which case they are charged a higher nonresident tuition. *Id.* § 68050. Undocumented immigrants are classified as nonresidents. *Id.*

§ 68062(h) (aliens who cannot establish domicile under federal law are prohibited from establishing residence in California).

There are several thousand students who graduate from California high schools who, for various reasons, are not legal residents of the State. The California Secretary for Education estimates, for example, that there are about 500 children who attend California high schools but are residents of an adjoining state or country (Mexico), *see* Cal. Educ. Code §§ 48050-48051, or who attend California boarding schools but legally reside in another State. Pet. App. 77. In addition, about 5,000 to 6,000 children of undocumented immigrants – who are barred from establishing residency under California law, Cal. Educ. Code § 68062(h) – graduate each year from California high schools. Pet. App. 77.

Ten years ago, the California Legislature decided to exempt certain *nonresident* students from the higher, nonresident tuition rates; specifically, those who attend and graduate from California high schools. On October 12, 2001, the Governor signed into law California Education Code § 68130.5, which exempts all California high school graduates, including citizens and undocumented immigrant students, from paying nonresident tuition.

In enacting the exemption, the Legislature declared that California's collective productivity and economic growth would increase by creating for all of its high school graduates a tuition policy that ensures

access to its colleges and universities. Pet. App. 79-80. The Legislature recognized that California high school graduates showed academic promise by virtue of their graduation and their acceptance into California colleges and universities. *Id.*

Thus, § 68130.5 exempts from out-of-state tuition any nonresident student who is registered at a California public university or college and has attended for three years and graduated from a California high school. An undocumented immigrant may qualify for this exemption if he or she meets these threshold requirements and files an affidavit stating he or she has filed or will file an application to legalize his or her status. Cal. Educ. Code § 68130.5(a)(4).

3. Petitioners are United States citizens who are not California residents and do not qualify for the out-of-state tuition exemption. They pay higher, nonresident tuition to attend a California university or college because they do not meet the high school attendance and graduation requirements to qualify for the exemption afforded by § 68130.5. Petitioners filed a complaint in the superior court of California alleging that the state statutory exemption is preempted by §§ 1621 and 1623; that it violates their rights under the Equal Protection and Privileges and Immunities Clauses; and that it violates California's Unruh Civil Rights Act. Pet. App. 47-51. Petitioners sought damages, and injunctive and declaratory relief. *Id.*

Respondents, Regents of the University of California, Robert C. Dynes (collectively, UC), Board of Trustees of the California State University, and Charles B. Reed (collectively, CSU), and the Board of Governors of the California Community Colleges and Chancellor Marshall Drummond (collectively, Community Colleges), filed a demurrer to the complaint. The trial court sustained the demurrer without leave to amend. Pet. App. 110-123.

Although the trial court found that, at the pleadings stage, petitioners had established standing under state law, it ruled (1) that petitioners had no private right of action under 42 U.S.C. § 1983[1] to enforce the federal immigration laws; (2) that the federal immigration laws do not preempt § 68130.5; and (3) that petitioners could not state a violation of their rights under the Equal Protection or Privileges and Immunities Clauses, or under the Unruh Civil Rights Act. Pet. App. 110-123.

The California court of appeal reversed. Pet. App. 38-109. It concluded that § 1623 preempts the exemption because, *inter alia*, the high school attendance and graduation requirements were "de facto" residency requirements. Pet. App. 78. But in rulings favorable to the respondents, the court of appeal found that petitioners had forfeited any appeal of the ruling that they lacked a private right of action under

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[1] This case proceeded under a state law cause of action, Cal. Code Civ. Proc. § 1060, for declaratory relief.

§ 1983. Pet. App. 8. The court of appeal also recognized that respondents were immune from damages, tuition refunds or waivers, or other retroactive relief under the Unruh Civil Rights Act. Pet. App. 105.

The California Supreme Court reversed the court of appeal. It held that the federal immigration statutes did not expressly preempt § 68130.5 because the state exemption did not condition eligibility on residence within California but on other criteria. Pet. App. 6. In rejecting that state law made eligibility turn on residence, the court also found that the state law otherwise complied with § 1623, because both undocumented immigrants and nonresident citizens can be eligible: the exemption "is given to all who have attended high school in California for at least three years . . . and not all who have done so qualify as California residents for purposes of in-state tuition, . . . and further because not all unlawful aliens . . . are eligible. . . ." *Id.*

The state supreme court also concluded that there was no implied preemption. It recognized that Congress, generally, intended that the availability of public benefits not constitute an incentive for immigration. Pet. App. 20. But it reconciled this generalized intent with the more specific language of § 1623:

> This general immigration policy would have supported an absolute ban on unlawful aliens' receiving the exemption. But section 1623 does not impose an absolute ban. The general policy . . . cannot change section 1623's

> plain language or Congress's specific charge in this regard.

Id. The state supreme court noted, further, that § 1621 carved out exceptions to the general prohibition against availability of public benefits for undocumented immigrants permitting undocumented immigrants to receive emergency medical treatment, emergency disaster relief, immunizations, and other services such as soup kitchens, crisis counseling and intervention, and short-term shelters. *Id.*

REASONS FOR DENYING CERTIORARI

There are at least three major reasons certiorari should be denied.

First, petitioners have failed to establish Article III standing; this Court, therefore, lacks jurisdiction over their disagreement with the State. Regardless of establishing standing in state court, petitioners must meet federal standing requirements when seeking to invoke this Court's jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Petitioners complain merely that others receive a state benefit for which they do not qualify in any event. Even if they were successful on the merits, a favorable ruling would not reduce their tuition rates or confer any relief on them whatsoever. Fundamentally, they seek to advance a purely generalized grievance – an allegation that California is not in compliance with federal law – which this Court has rejected as a basis

for standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992) (recognizing longstanding rule that plaintiff with only a generalized grievance seeking proper application of law states no case or controversy).

Second, this Court's intervention is not merited as there is no split among the circuit courts or state high courts on the questions presented in the certiorari petition. Indeed, only one circuit court has examined § 1623, and it ruled in the state's favor based on plaintiffs' lack of standing. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *rehearing and rehearing en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008). Petitioners rely heavily upon a district court decision that they say conflicts with the California Supreme Court's decision. But, even if there were such a conflict, a single district court opinion does not create the level of conflict that warrants this Court's intervention.

Third, this case is a poor vehicle for reaching the second question presented – whether a court must conduct an implied preemption analysis. The California Supreme Court indeed performed an implied preemption analysis and found no preemption based on the express authorizations in §§ 1621 and 1623.

I. THIS COURT LACKS JURISDICTION BECAUSE PETITIONERS HAVE NO STANDING.

Petitioners lack Article III standing because the challenged state law does not injure them in any way that may be redressed by this lawsuit. Section 68130.5 provides an exemption from nonresident tuition to graduates of California high schools, regardless of residency. Petitioners, however, admit that they did not attend or graduate from a California high school. Pet. App. 45. Accordingly, even were the petitioners to obtain their desired outcome – to strike the exemption as it applies to undocumented immigrants – petitioners would receive no relief, as they would continue to not qualify for reduced tuition.

Although petitioners alleged sufficient standing in state court,[2] "[s]tanding to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 804 (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952); *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In *Phillips*, this Court granted certiorari to review a state supreme court decision regarding gas company investors suing a natural gas producer for royalty payments. Before proceeding to the merits, this Court

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[2] The trial court overruled the Community Colleges and CSU's demurrer based on petitioners' lack of standing, distinguishing Article III standing principles from state court requirements. Pet. App. 120.

examined whether plaintiffs met Article III standing requirements despite prior standing in state court. *See Arizona Christian Sch. Tuition Org. v. Winn*, No. 09-987, ___ U.S. ___, 2011 U.S. LEXIS 2612, at *7-*8 (Apr. 4, 2011) ("To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution."); *Asarco v. Kadish*, 490 U.S. 605, 610-611 (1989) ("Before we may . . . consider whether the state legislation . . . is valid under federal law, we must rule on whether we have jurisdiction in this case" citing to Article III).[3]

To proceed in this Court, therefore, petitioners must show that they meet all three requirements of standing under Article III: (1) injury-in-fact; (2) causation between the injury and the alleged illegal conduct; and (3) a likelihood that a favorable decision will redress the alleged injury. *Northeastern Fla. Ch. of Associated Gen. Contractors of America v. Jacksonville, Fla.*, 508 U.S. 656, 663 (1993).

However, petitioners cannot satisfy the first requirement that they have suffered some threatened

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[3] *Asarco v. Kadish* is not to the contrary. 490 U.S. 605. There, this Court granted certiorari despite the fact that it determined that plaintiffs lacked Article III standing in state court. This Court, nonetheless, found the requirements for Article III were met in connection with the *defendants* who were the petitioning party, based on the concrete injury the defendants sustained as a result of the adverse state court judgment. *Id.* at 617-618. In contrast, petitioners, here, do not have any change in their obligations as a result of the adverse decision.

or actual injury resulting from the alleged illegal act. An injury for purposes of standing must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. That injury "must affect the plaintiff in a personal and individual way." *Loving v. Boren*, 133 F.3d 771 (10th Cir. 1998) (affirming dismissal for lack of standing, quoting *Lujan*, 504 U.S. at 574).

Petitioners claim that they have been illegally denied the exemption from nonresident tuition offered by § 68130.5, but do not claim that they attended a California high school or otherwise qualify for the exemption. Pet. App. 44-45. They cannot allege any personal harm flowing from § 68130.5 by virtue of the possibility that individuals other than themselves pay lower tuition under § 68130.5.[4] If the state law is invalidated, undocumented immigrants and other nonresident citizens who meet the exemption requirements will have to pay more in tuition, but petitioners' tuition will remain unchanged.

In a similar case alleging that §§ 1621 and 1623 preempted a state tuition law, the Tenth Circuit held that U.S. citizen plaintiffs lacked standing to challenge a Kansas law that permitted certain undocumented immigrants to qualify for in-state tuition rates. The trial court noted plaintiffs' lack of injury explaining:

---

[4] Petitioners allege that they "have been injured by having paid nonresident tuition while illegal aliens have been unlawfully exempt. . . ." Pet. App. 47.

> When a law does not apply to a party, that party has no invasion of a legally protected interest. Here, none of the plaintiffs are subject to the provisions of K.S.A. 76-731a. Prior to the passage of the law, plaintiffs paid out-of-state tuition. With the passage of K.S.A. 76-731a, plaintiffs continued to pay out-of-state tuition. The law passed by the Kansas legislature does not apply to plaintiffs, and plaintiffs have made no argument that it does.

Day v. Sebelius, 376 F. Supp. 2d 1022, 1033 (D. Kan. 2005), *aff'd, Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *rehearing and rehearing en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008).

The Tenth Circuit noted that plaintiffs' sole basis for any alleged injury to support their preemption claim rested on purported "rights" derived from § 1623. *Day v. Bond*, 500 F.3d 1136. Thus, to determine whether plaintiffs had standing, it proceeded to analyze whether § 1623 conferred a private right of action:

> Plaintiffs' only form of alleged injury for their preemption claim was "the invasion of a putative statutory right conferred on them by [8 U.S.C.] § 1623." [Citation omitted]. Therefore, if § 1623 did not confer such a right on Plaintiffs, they would lack standing for their preemption claim. Our standing analysis thus required us to analyze whether

> § 1623 confers a private right of action. [Citation omitted].

511 F.3d at 1032.

Any attempt by petitioners to allege standing derived from § 1621 or § 1623 must fail. Neither § 1621 nor § 1623 grants petitioners a private right of action to enforce their statutory commands. Indeed, petitioners did not appeal from the trial court's ruling that petitioners had no "private right of action to bring claims alleging violations of 8 U.S.C. §§ 1621 and 1623." Pet. App. 120-121; Pet. App. 8 (plaintiffs forfeited their claim that they have a private right of action to enforce § 1621 or § 1623).

Moreover, the Tenth Circuit addressed precisely this issue and concluded that U.S. citizen plaintiffs "held no legal right under § 1623 to assert preemption" and that their claim of "an individual legal right under § 1623 to support standing is legally invalid." *Day v. Bond*, 500 F.3d at 1139.

In short, petitioners' real complaint is that the California exemption purportedly is not in compliance with federal law. But Article III standing cannot be based on such generalized grievances. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also United States v. Richardson*, 418 U.S. 166 (1974) ("[A] taxpayer may not 'employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System'"). Because petitioners have no legally protected interest or rights to enforce

immigration laws, they lack standing to pursue their claims. *Sadowski v. Bush*, 293 F. Supp. 2d 15 (D.D.C. 2003) (plaintiff lacked standing to enforce immigration laws); *see also Federation for Am. Immig. Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996) (interest in limiting the effects of immigration was too widespread, and commonality of alleged injury to entire population prevented standing).

II. THERE IS NO CIRCUIT SPLIT, OR ANY SPLIT AMONG THE FEW COURT DECISIONS THAT HAVE INTERPRETED § 1623.

Review is unwarranted, further, because there is no appellate level conflict to warrant this Court's intervention and, indeed, to date, few courts have had an opportunity even to consider this issue. The California Supreme Court decision is the first appellate decision to reach the merits of whether § 1623 preempts a state law under which an undocumented immigrant may receive reduced tuition.

Petitioners create an illusory conflict citing to a district court decision in *Equal Access Educ. v. Merten*,[5] 305 F. Supp. 2d 585 (E.D. Va. 2004), that

[5] Moreover, *Equal Access* involved a challenge to college admission criteria rather than college tuition. 305 F. Supp. 2d 585. That court found that neither § 1621 nor § 1623 involved access to higher education. Petitioners rely on language, Pet. 26, not central to the issue of whether a college may deny admission to undocumented immigrants: "public post-secondary institutions need not admit illegal aliens at all, but if they do, these

(Continued on following page)

purportedly conflicts with the California Supreme Court's decision here. Pet. 25-26. In fact, the decisions are consistent. Both the California Supreme Court and the district court concluded that under § 1623 "aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit." Pet. 26 (citing *Equal Access* at 607); *see* Pet. App. 17-18 (California Supreme Court decision using the statutory term "eligible" instead of "receive"). In any event, a conflict between a single district court decision and a state supreme court decision does not merit this Court's intervention. *Cf.* Supreme Court Rule 10.

Only one circuit court of appeals has considered a claim of preemption under § 1623, and it ruled only on grounds of standing, not on the merits of the preemption question. *Day v. Bond*, 511 F.3d 1030. In *Day v. Bond*, the Tenth Circuit Court of Appeals "affirmed the district court's dismissal of the preemption claim after concluding that Plaintiffs lacked standing because § 1623 did not confer a private right of action." 511 F.3d at 1032, citing to 500 F.3d at 1139.

There is simply no conflict that warrants a grant of certiorari.

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aliens cannot receive in-state tuition benefits unless out-of-state United States citizens receive this benefit." *Id.* at 606.

III. THE CALIFORNIA SUPREME COURT CONDUCTED BOTH AN EXPRESS AND IMPLIED PREEMPTION ANALYSIS.

Review is not warranted of the second question presented, either. This case does not present the question of whether a court must undertake conflict preemption analysis after concluding that there is no express preemption. Here, the California Supreme Court *did*, in fact, conduct both an express and implied preemption analysis.[6] The state supreme court correctly determined that there was no preemption.

A. The California Supreme Court Correctly Concluded that § 1623 Does Not Expressly Preempt the State Tuition Law.

The California Supreme Court correctly found that the state tuition law is not expressly preempted by § 1623, but authorized by the clear and unambiguous text of federal law. Applying settled principles of statutory construction, the court rightly rejected petitioners' atextual reading of § 1623, which relies, primarily, on legislative history to contradict the statute's plain language.

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[6] Petitioners inaccurately assert that the California Supreme Court "refus[ed] to consider Petitioners' conflict preemption challenges," Pet. 28, concluded "that it could skip over the conflict preemption issues in this case," Pet. 29, avoided "conducting a conflict preemption analysis," Pet. 32, and "opted not to review the conflict preemption challenges in this case," Pet. 33.

1. The California Supreme Court Correctly Found No Express Preemption Based on the Clear and Explicit Text of § 1623.

The California Supreme Court found that "the actual statutory prohibition [in § 1623] is not absolute, but qualified." Pet. App. 23. The plain and unambiguous language of § 1623 does not flatly prohibit any undocumented immigrant from ever receiving a residence-based postsecondary education benefit. § 1623(a). Rather, it requires a state that decides to provide such a benefit to an undocumented immigrant, to also provide a nonresident citizen the same opportunity to be equally eligible. *Id.* Accordingly, the California Supreme Court examined whether the state tuition law's requirements granted a benefit to an undocumented immigrant "on the basis of residence within the state." Pet. App. 14-24. It was correct in finding that the exemption's criteria of high school attendance and graduation were not based on residence. *Id.* The court also appropriately concluded that both nonresident citizens and undocumented immigrants could qualify for the state exemption and fall within the explicit terms of § 1623. Pet. App. 18-19.

The exemption does not treat undocumented immigrants as residents. Rather, only nonresidents can qualify for the exemption. Cal. Educ. Code § 68130.5. Indeed, the court correctly noted that both before and after the passage of the state exemption, "the law has been that unlawful immigrants cannot

be deemed California residents for purposes of paying resident tuition." Pet. App. 17.

The Court further found that the exemption is not based on residence because, in fact, "many nonresidents may qualify for it," explaining:

> Every nonresident who meets section 68130.5's requirements – whether a United States citizen, a lawful alien, or an unlawful alien – is entitled to the nonresident tuition exemption.
>
> Pet. App. 18. Some American citizens who are not residents of California may also be eligible for the exemption.
>
> . . . First, some students who live in an adjoining state or country are permitted to attend high school in California . . . even though they are not California residents. (Citations omitted.) Second, the children of parents who live outside of California but who attend boarding schools in California might attend California high schools for three years, yet not be California residents. Third, those who attended high school in California for three years but then moved out of the state and lost their residency status would apparently be eligible for the exemption if they decided to attend a public college or university in California.

Pet. App. 18-19.

Thus, the California Supreme Court correctly analyzed the clear and explicit text of § 1623 and

concluded that California's exemption is not residence-based and that it further complies with § 1623's requirement that a nonresident citizen also be eligible.

2. Petitioners' Reliance on Legislative History Does Not Support Preemption.

Petitioners' interpretation of § 1623 is strictly atextual – they wrongly assert that *every* citizen of the United States is required to receive the exemption if even one undocumented immigrant is provided the benefit. Pet. 4, 5, 11, & n. 5. This unsupported reading requires inserting language not otherwise present in the statute. The text of § 1623 speaks only in the singular with respect to both an undocumented immigrant and a nonresident citizen. To support petitioners' interpretation, this Court would have to rewrite the statute and replace "*a* citizen or national" with "*all* citizens or nationals." In addition, petitioners' version requires that the language, "*eligible* for such a benefit" be changed to "*all* citizens must *receive*" the exemption, not merely given the opportunity to qualify. Petitioners also misconstrue § 1623's language as prohibiting resident tuition rates to undocumented immigrants. Pet. 17-22. The explicit text is not a flat prohibition but a qualified one. Pet. App. 23.

Petitioners evade the actual text of federal law and begin their analysis with the legislative history. Pet. 18-22. They justify their detour into legislative

history by arguing alleged conformity with Congressional intent. Pet. 18. But where intent is clear from the face of the statute, there is no need to venture into legislative history. *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (we start with the language of the statute); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (appeals to legislative history are well taken only to resolve statutory ambiguity); *United States v. Rone*, 598 F.2d 564, 569 (1979) (proper function of legislative history is to solve, not create, ambiguity). Courts need not consult external sources of legislative intent where the statutory language is clear and unambiguous.

The California Supreme Court examined and rightly rejected the three pieces of legislative history upon which petitioners rely: a conference committee report and statements by two individual legislators. Pet. App. 20-23; Pet. 20-21.

The conference committee report regarding § 1623 states: "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." Pet. App. 21. The state supreme court commented that the report "oversimplifies more nuanced statutory language." Pet. App. 22. In addition, the court stated that the report did not reliably show that Congress intended to prohibit states *entirely* from allowing undocumented immigrants to pay in-state tuition. *Id.* Petitioners' reliance on a conference report, cannot replace the actual text of the statute, itself:

> [T]he authoritative statement is the statutory text, not the legislative history. . . . judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobile v. Allpattah Services, 545 U.S. 546, 568-569 (2005).

Nor do the statements of two individual legislators accurately reflect the intent of Congress as a whole. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (remarks of a single legislator, even a sponsor, are not controlling in analyzing legislative history).

Legislative history that generally summarizes, but fails to capture the nuances of the statute, cannot defeat the explicit text of the law. Pet. App. 23. As the state supreme court concluded "Section 1623's actual language prevails," not the legislative history. *Id.*

B. The California Supreme Court Correctly Found No Implied Preemption Where Congress Expressly Gave States Authority to Give Public Postsecondary Benefits to Undocumented Immigrants.

Implied preemption may occur when Congress expresses an intent to occupy the field of law, or

where the state law actually conflicts with federal law and it is either impossible to comply with both federal and state law or where the state law stands as an obstacle to Congressional purposes. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002).

Here, the California Supreme Court analyzed both field preemption and conflict preemption, and its discussion included analysis of both impossibility and obstacle preemption. Pet. App. 18-19, 30-32. The state court opinion specifically discussed obstacle and field preemption under a separate heading entitled "Implied preemption." Pet. App. 30-31. And in its general discussion of § 1623, the court analyzed whether it was possible to comply with both state and federal law. Pet. App. 18-19.

As to field preemption, the California Supreme Court referred to § 1621(d)[7] as highlighting Congress's explicit grant of authority to the states to provide public benefits to undocumented immigrants. Pet. App. 31. The state court concluded that "[t]his language shows Congress did not intend to occupy the field fully." *Id.*

Further, in its discussion of § 1623, the court also addressed how it was possible for the State law to comply with the federal law, concluding that both nonresident citizens and undocumented immigrants

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[7] The decision actually cites to § 1621(c), however, the correct subdivision is § 1621(d).

could attend California high schools.[8] The court noted at least three categories of nonresidents that could qualify for the exemption: 1) nonresidents who live in a state or country that borders California and attend California high schools; 2) children of nonresident parents who attend California boarding schools; and 3) former California residents who graduate from a California high school who may move out-of-state and later decide to return to California. Pet. App. 18-19.

Thus, the California Supreme Court not only correctly found that § 68130.5 was not based on residence, but it also concluded that the exemption further complied with § 1623 as it was possible for both undocumented immigrants and nonresident citizens to be eligible for the same benefit. Pet. App. 17-19.

Finally, the California Supreme Court discussed obstacle preemption when it analyzed the Congressional purpose of the immigration legislation. Pet. App. 20. The Court noted that although Congress announced a national policy to reduce the availability of public benefits to remove the incentive for illegal immigration, *id.*, such general policy cannot defeat Congress's exception in § 1623:

> The general immigration policy would have supported an absolute ban . . . [b]ut section

---

[8] Although the California Supreme Court did not explicitly label this discussion as the impossibility prong of implied preemption, it effectively disposes of that analysis.

> 1623 does not impose an absolute ban. The general policy in section 1601 cannot change section 1623's plain language or Congress's specific charge in this regard.

Id. In discussing obstacle preemption, the state supreme court concluded that Congress did not create an exception from its general policy only to frustrate its own purpose. That is, the state court concluded, the ban against public benefits for undocumented immigrants in § 1601 is qualified by the saving clause in § 1621(d), which permits states to provide public benefits.[9] Congress then went a step further in enacting § 1623, by specifically stating that, to the extent a State allows an undocumented immigrant to be eligible for postsecondary education benefits based on residence within a State, it must also allow a nonresident citizen similar eligibility.

The California Supreme Court, therefore, analyzed implied preemption principles and concluded that the exemption was not impliedly preempted by § 1623. The question presented in the petition, then, does not arise in this case, let alone merit this Court's review.

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[9] Amicus Eagle Forum agrees that "Congress allowed states to enact *new*, post-PRWORA benefits for illegal aliens under certain conditions." Eagle Br. 4.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 18, 2011

Respectfully submitted,

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APPENDIX A

Title **8 U.S.C. § 1621** provides in pertinent part:

(a) In general. Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not –

(1) a qualified alien (as defined in section 431 [8 USCS § 1641]),

(2) a nonimmigrant under the Immigration and Nationality Act, or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 USCS § 1182(d)(5)] for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c)).

(b) Exceptions. Subsection (a) shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of the Social Security Act [42 USCS § 1396b(v)(3]) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for

testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter). . . .

. . .

(c) "State or local public benefit" defined.

(1) Except as provided in paragraphs (2) and (3), for purposes of this subtitle [8 USCS §§ 1621 et seq.] the term "State or local public benefit" means —

. . .

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

. . .

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits. A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only

through the enactment of a State law after the date of the enactment of this Act [enacted Aug. 22, 1996] which affirmatively provides for such eligibility.

Title **8 U.S.C. § 1623** provides in pertinent part:

(a) In general. Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

California Education Code § 68130.5 provides in pertinent part:

Notwithstanding any other provision of law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

No. 10-1029

IN THE

Supreme Court of the United States

ROBERT MARTINEZ, et al.,

Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether California Education Code Section 68130.5, which exempts all students who have attended high school in California for three or more years and graduated from paying nonresident tuition at state public colleges and universities, is expressly preempted by 8 U.S.C. Section 1623 although it does not condition eligibility for the exemption on the basis of residence in California and nonresident U.S. citizens can and do qualify for the exemption without regard to residence.

Whether California Education Code Section 68130.5 is impliedly preempted by federal law although Congress expressly authorized states to make unlawful aliens eligible for postsecondary education benefits subject to certain conditions that are satisfied here.

DISCLOSURE STATEMENT

Respondent The Regents of the University of California is a government entity with neither a parent company nor any non-wholly-owned subsidiaries. Respondent Mark G. Yudof is the President of the University of California, and is named in his official capacity. Respondent The Board of Trustees of the California State University is also a government entity with neither a parent company nor any non-wholly-owned subsidiaries. Respondent Charles B. Reed is the Chancellor of the California State University, and is named in his official capacity.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. 1-37) is officially reported at 241 P.3d 855 (2010). The opinion of the California Court of Appeal, Third Appellate District (Pet. App. 38-109) is not published by virtue of the California Supreme Court's order granting review of that decision. CAL. R. CT. 8.1105(e)(1), 8.1115(a). The order of the California Superior Court, Yolo County (Pet. App. 110-123) is not published.

JURISDICTION

This Court lacks jurisdiction to consider the petition for certiorari because Petitioners lack Article III standing. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

California Education Code Section 68130.5

Notwithstanding any other provision of law:

(a) A student, other than a nonimmigrant alien within the meaning of paragraph (15) of subsection (a) of Section 1101 of Title 8 of the United States Code, who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

(1) High school attendance in California for three or more years.

(2) Graduation from a California high school or attainment of the equivalent thereof.

(3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.

(4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so.

8 U.S.C. § 1621

(a) Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not –

(1) A qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C. § 1101 et seq.], or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C. § 1182(d)(5)] for less than one year,

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

* * *

(c) (1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means –

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

* * *

(d) A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

8 U.S.C. § 1623

(a) Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

(b) This section shall apply to benefits provided on or after July 1, 1998.

STATEMENT OF THE CASE

A. California Education Code Section 68130.5.

Section 68130.5 of the California Education Code was enacted and signed into law in 2001. That state tuition law exempts certain students, including unlawful aliens who meet its requirements, from paying nonresident tuition in the state's public colleges and universities. Section 68130.5 does not condition eligibility for the exemption on a student's residence or citizenship status. Rather, *any* person who meets the statutory requirements—attendance at a California high school for three or more years and graduation—is eligible under the statute, without regard to that person's residence or immigration status. Nonresident students from states other than California who satisfy the statutory criteria can and do qualify for the tuition exemption.

Despite Petitioners' accusation (Pet. 4), the California Legislature did not deliberately "defy" federal law when

it enacted Section 68130.5. To the contrary, it carefully tailored that statute to comply with federal law.

The Petition contains an incomplete account of the pertinent facts. As Petitioners note (Pet. 5-6), in 2000, then-Governor Gray Davis vetoed an earlier version of the legislation. Pet. App. 15. However, the Petition fails to mention that following that veto, the legislation's author sought the opinion of California's Legislative Counsel, a nonpartisan official charged with advising the Legislature regarding the validity and constitutionality of proposed legislation. In a June 22, 2001 opinion letter, the Legislative Counsel concluded that AB 540, the legislation by which Section 68130.5 ultimately was enacted, would *not* conflict with Section 1623. *Id.*[1] The Legislature expressly relied upon that opinion in enacting AB 540, and Governor Davis then signed the legislation into law. In an uncodified section of the bill, the Legislature expressly found that "[t]his act . . . does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code." *Id.* Thus, as the California Supreme Court found, far from "defying" federal law, the Legislature carefully attempted to comply with federal law. *Id.* at 16, 23.

B. The Proceedings Below.

More than four years after the enactment of Section 68130.5, Petitioners filed a complaint in Yolo County Superior Court against Respondents The Regents of the University of California ("The Regents") and President

1. The California Supreme Court took judicial notice of that opinion, although it did not give it weight in its analysis. Pet. App. 15-16.

Mark G. Yudof, the California State University System and the California Community Colleges and their respective officials. Pet. App. 7.[2] Petitioners alleged they are United States citizens from states other than California who are or were students paying nonresident tuition at a California public university or college. *Id.* They sought to represent a class consisting of "thousands of former and current nonresident U.S. citizens." *Id.*

The complaint alleged that Section 68130.5 violates a number of federal and state statutes and constitutional provisions. *Id.* at 7-8. Petitioners sought a determination that Section 68130.5 was invalid, reimbursement of nonresident tuition fees, damages, and attorneys' fees. *Id.* at 8.[3]

Respondents demurred, contending that the complaint failed to state a cause of action. *Id.* The trial court sustained the demurrer without leave to amend and dismissed the action. *Id.* The court of appeal reversed the judgment in part. It held that Petitioners had forfeited the claim that they have a private right of action to enforce Section 1621 or Section 1623, and rejected Petitioners' arguments that Section 68130.5 conflicted with various

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2. By resolution, The Regents made Section 68130.5 applicable to the University of California. Pet. App. 11 n.1.

3. Petitioners' factual contentions regarding the number of unlawful aliens who purportedly benefit from the statutory exemption and the alleged cost of that provision to the State of California (Pet. 9 & n.7) are unsupported by the record. *See* Pet. App. 77 n. 19 ("We need not resolve factual disputes at this demurrer stage"). They are also irrelevant to the legal issues presented by this facial challenge.

state statutory and constitutional provisions. *Id.* However, the court of appeal held that Section 68130.5 is expressly preempted by both Sections 1621 and 1623, that it is also impliedly preempted, that Petitioners should be allowed leave to amend their equal protection claim,[4] and that the complaint stated a claim that Section 68130.5 violates the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 8-9.

All parties sought review by the California Supreme Court, which denied Petitioners' petition for review and granted Respondents' petitions for review. *Id.* at 9.

C. The California Supreme Court's Decision.

In a unanimous decision authored by Associate Justice Ming W. Chin, the California Supreme Court rejected Petitioners' primary challenge to Section 68130.5—that it confers eligibility on the basis of residence in California in violation of Section 1623. The court also concluded that Petitioners' remaining challenges to Section 68130.5 lack merit. Accordingly, it reversed the judgment of the court of appeal.

At the outset, the court observed that although the subject of persons unlawfully present in this country is a "controversial" one, "this court does not make policy." Pet. App. 5.[5] "Whether Congress's prohibition or the

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4. Petitioners later stipulated to dismiss that claim.

5. In an introductory aside, the court declined to employ either of the terms "undocumented immigrant" or "illegal alien" to refer to persons not lawfully in the country. Pet. App. 13-14. Rather, "[w]ishing to be as neutral, yet as accurate, as possible in

Legislature's exemption is good policy is not for us to say. Rather, we must decide the legal question of whether California's exemption violates Congress's prohibition or is otherwise invalid." *Id.* The court undertook that task "by employing settled methods of statutory construction." *Id.* at 5-6.

The court acknowledged that "[t]he power to regulate immigration is unquestionably exclusively a federal power." *Id.* at 12 (citations and internal quotations omitted). However, quoting this Court's seminal decision in *De Canas v. Bica*, 424 U.S. 351 (1976), it observed, "While the immigration power is exclusive, it does not follow that any and all state regulations touching on aliens are preempted." *Id.* The court declined to decide whether a presumption against preemption should apply, explaining that "[w]e need not resolve the question here because . . . we find no preemption even without a presumption." *Id.* at 13.[6]

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our terminology," the court used the term "unlawful alien," which was closest to the wording employed by the pertinent federal and state statutes. *Id.* at 14. We will follow the same convention here. We note, however, that this Court has employed the very term, "undocumented immigrant," to which Petitioners objected below. *E.g., Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 603 (2009) (referring to "undocumented immigrants" and "undocumented workers").

6. For that reason, this Court should decline *amicus* Eagle Forum's invitation to decide that issue as well as others not presented in the Petition. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Further, *amici curiae* generally may not present additional questions for review. *Bell v. Wolfish*, 441 U.S. 520, 531-32 n.13 (1979).

The court first addressed Petitioners' main claim, that Section 68130.5 violates Section 1623, which states that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State. . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident." In resolving that issue, the court considered "primarily section 1623's language." Pet. App. 16. Based on the plain statutory language, the court rejected Petitioners' claim. *Id.* at 17.

The court explained that the "fatal flaw" in Petitioners' argument is the contention that the statutory exemption from paying out-of-state tuition is "on the basis of residence within a State":

> It is not. It is based on *other* criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important here, that they have attended "[h]igh school . . . in California for three or more years."

Id. (quoting CAL. EDUC. CODE § 68130.5(a)(1), (2), & (4)). Thus, the exemption "cannot be deemed to be based on residence for the simple reason that many *nonresidents* may qualify for it." *Id.* at 18.

In particular, the court listed several categories of students who could have attended high school in California for at least three years and otherwise qualified for the

exemption yet not be California residents: students who live in an adjoining state or country and attend high school in California (citing CAL. EDUC. CODE §§ 48050, 48051); minor children of out-of-state parents who attend boarding schools in California; and students who attended high school in California for three years but then moved out of the state and lost their residency status. *Id.* at 18-19. Indeed, the court noted that "a majority of University of California students receiving the nonresident tuition exemption are in this country lawfully." *Id.* at 19.[7]

The court also rejected the court of appeal's reasoning that the statutory criteria establish "a surrogate criterion" for residence, again pointing to the wording of Section 1623:

> A residency requirement and the criteria stated in section 68130.5 share certain similarities, and those who satisfy section 68130.5 will often also be residents of California. But, as we have explained, section 68130.5's criteria are not the same as residence, nor are they a de facto or surrogate residency requirement. Congress specifically referred to *residence*—not some form of surrogate for residence—as the prohibited basis for granting unlawful aliens a postsecondary education benefit.

Id. at 19-20.

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7. Every year since 2002, "documented" students at the University of California (that is, U.S. citizens, legal permanent residents, and students with immigrant visas) have accounted for at least 70% of recipients of the exemption. Univ. of Calif. Ofc. of the President, *Annual Report on AB 540 Tuition Exemptions 2008-09 Academic Year*, 3, 7, 11 (Sept. 21, 2010), http://www.ucop.edu/sas/sfs/docs/ab540_annualrpt_2010.pdf (last visited Apr. 15, 2011).

The court rejected the argument that Section 1623 constitutes an absolute ban on unlawful aliens' receiving the exemption, reasoning that "[i]f Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition, it could easily have done so." *Id.* at 19. Construing Section 1623 as an absolute prohibition would read the phrase "on the basis of residence within a State" out of the statute. "The reference to the benefit being on the basis of residence must have some meaning. It can only qualify, and thus limit, the prohibition's reach." *Id.*

Finally, the court rejected Petitioners' reliance on the sparse legislative history of Section 1623, concluding it "does not reliably show that Congress intended to prohibit states entirely from exempting unlawful aliens from paying nonresident tuition." *Id.* at 22. The court noted that a conference committee report on a prior version of the legislation stated, "This section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education." *Id.* at 21. However, the court found that one-sentence summary "oversimplifies more nuanced statutory language." *Id.* It "cannot change the circumstance that the actual statutory prohibition is not absolute, but qualified." *Id.* at 23. In short, "Section 1623's actual language prevails, not the committee report's." *Id.* The court also rejected Petitioners' reliance on floor statements by two individual legislators, observing that such views "carry little weight in interpreting the intent of the legislative body as a whole." *Id.*

Next, the court addressed Petitioners' argument that Section 68130.5 is expressly preempted by another federal statute, Section 1621. The first part of that statute proclaims "a general rule that unlawful aliens are not eligible for state or local public benefits." *Id.* at 25 (citing

8 U.S.C § 1621(a)). However, a second subparagraph of the statute (which Petitioners omit from their quotation of the statute, Pet. 2), states that "[a] State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). The court had little trouble concluding that Section 68130.5 meets both statutory criteria: it was enacted in 2002; and subdivision (a)(4) of the state law expressly refers to "a person without lawful *immigration* status." *Id.* at 26.

The court also addressed and rejected Petitioners' claim that Section 68130.5 is impliedly preempted by federal law. *Id.* at 30-32. Pointing to Section 1621(d), which authorizes states to provide public benefits to unlawful aliens so long as they do so in compliance with the statute's requirements, the court concluded that "Congress did not intend to occupy the field fully." *Id.* at 31. "Because section 68130.5 complies with the conditions set out in both section 1621 and section 1623, those statutes cannot impliedly preempt it." *Id.*

Finally, the court rejected as unsupported by authority Petitioners' novel theory that Section 68130.5 violates the rights of nonresident students under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 34. Moreover, the court noted, the asserted basis for that claim is erroneous: Section 68130.5 "does not treat citizens worse than unlawful aliens. It grants the same exemption to *all* who qualify, whether they are non-resident citizens or resident unlawful aliens." *Id.* at 35.

REASONS FOR DENYING THE PETITION

As a threshold matter, this Court lacks jurisdiction to consider the petition for certiorari for the fundamental reason that Petitioners lack Article III standing. As nonresident students who do not qualify under Section 68130.5, Petitioners would not be eligible to pay resident tuition even if that statute were to be stricken. Moreover, they forfeited in the lower courts their claims under Section 1623 and 42 U.S.C. § 1983. As such, Petitioners do not have any cognizable and individualized injuries stemming from the implementation of Section 68130.5, and are unable to show that such injuries would be redressed by a decision in their favor. *See* Part I, *infra*.

Even if Petitioners could overcome this dispositive jurisdictional hurdle, neither of the issues they ask the Court to decide is actually presented by the California Supreme Court's unanimous and carefully reasoned decision.

Petitioners first assert that the Court should decide whether Section 68130.5 is expressly preempted by federal law because the California Legislature deliberately "defie[d] the congressional intent behind 8 U.S.C. § 1623. . . ." Pet. i. Petitioners repeat that extraordinary accusation throughout the Petition. *See id.* at 4, 7 (charging California with a "policy of calculated defiance" of federal law and accusing other states of having "circumvented federal law in this area with impunity"); *id.* at 24, 36 (accusing Legislature of "play[ing] semantic games to defeat the objectives of Congress"). But that heated rhetoric is belied by undisputed facts that Petitioners ignore in their Petition. Those facts, as the California Supreme Court

determined, support precisely the *opposite* conclusion: that when it enacted Section 68130.5, "the Legislature was aware of section 1623" (Pet. App. 15); that it is "clear" from the law's legislative history that the Legislature intended to act "in a way that does *not* violate section 1623" (*id.* at 23 (emphasis added); and that the Legislature expressly found that the law did *not* violate Section 1623. *Id.* at 15.

There is no conflict among the lower courts regarding the proper interpretation of Section 1623. The instant case is the first appellate decision to address a preemption challenge to similar state tuition laws, although such claims are pending before other courts. Petitioners' contention that the California Supreme Court's decision conflicts with a decision by a single federal district court is incorrect and does not present any basis for certiorari. *See* Part II(A), *infra*.

Petitioners' second question is also based on a false premise. Petitioners assert that the court below, having concluded that Section 68130.5 was not expressly preempted by federal law, "refus[ed] to consider" Petitioners' implied preemption claims. Pet. 28. That refusal, Petitioners contend, conflicts with precedents of this Court that require a reviewing court to engage in conflict preemption analysis even if it has found that the state law is not expressly preempted. *Id.* at 28-36. However, Petitioners are mistaken: far from "refusing" to consider their implied preemption claims, the California Supreme Court in fact *did* address those claims, and rejected them on their merits. That decision amounts to no more than a lower court's application of an accepted rule of law, which does not present any basis for review. SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted

'when the asserted error consists of . . . the misapplication of a properly stated rule of law"). *See* Part II(B), *infra*.

Petitioners' speculation that California or other states may enact legislation in the future that might violate Section 1623 does not present any colorable basis for review. *See* Part II(C), *infra*. Moreover, in the fifteen years since the federal statutes in question were enacted, the U.S. Department of Homeland Security, the federal agency responsible for enforcement of the federal immigration laws, has not taken any action or expressed any views on the issues raised here even though Petitioners' *amici* expressly urged it to do so. That is a clear indication that this Court's intervention is not required. *See* Part II(D), *infra*.

Finally, the court correctly rejected Petitioners' express and implied preemption claims. That result was compelled by the plain language of Section 1623 and is entirely consistent with this Court's precedents regarding the proper role of legislative history in statutory interpretation. *See* Part III, *infra*. The Petition should be denied.

I. PETITIONERS LACK STANDING TO INVOKE THIS COURT'S JURISDICTION.

At the threshold, the Court lacks jurisdiction over the Petition for the fundamental reason that Petitioners lack standing under Article III of the Constitution. The Court should deny certiorari on that ground, which is dispositive.

"To obtain a determination on the merits in federal court, parties seeking relief must show that they have

standing u .der Article III of the Constitution." *Arizona Christian Sch. Tuition Org. v. Winn*, Nos. 09-987, 09-991, 563 U.S. ___, 2011 WL 1225707, at *3 (Apr. 4, 2011). This jurisdictional requirement applies at every stage of a case, including a petition for certiorari to this Court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 611-12 (1989) (Court must determine "whether there is standing and an actual case or controversy that permits of a decision in federal court," even if the parties seek for the first time on certiorari to invoke the authority of the federal courts); *see generally* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 19.1(b) at 91 (9th ed. 2007).

While state courts are "not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *ASARCO Inc.*, 490 U.S. at 617; *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988). However, this Court may exercise its certiorari jurisdiction in such a case only if the petitioning party can show a "direct, specific, and concrete injury." *Id.* at 623-24. An "undifferentiated, generalized grievance about the conduct of government" is insufficient. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).

Accordingly, "this Court has dismissed cases on appeal from state courts when it appeared that the complaining party lacked standing to contest the law's validity in the federal courts." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 8 n.2 (1988) (citations omitted).

See, e.g., Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (dismissing appeal from state court judgment where taxpayer plaintiffs lacked any "direct and particular financial interest" in allegedly unconstitutional state law); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam) (dismissing appeal "on the ground that appellant has no standing to litigate the constitutional question which the record presents"); *Braxton County Court v. West Virginia ex rel. Tax Comm'rs*, 208 U.S. 192, 197 (1908) (same). Those cases are controlling here, and mandate denial of the Petition.

Standing, a component of the case-or-controversy requirement (U.S. CONST. art. III, § 2, cl. 1), represents an "irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a party must satisfy three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (citations and internal quotations omitted). The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* at 561.

Here, as the Tenth Circuit squarely held in a nearly identical case, Petitioners cannot satisfy at least two of these requirements: injury in fact and redressability. In *Day v. Bond*, 500 F.3d 1127, *reh'g and reh'g en banc denied*, 511 F.3d 1030 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008), nonresident students sought to challenge a Kansas law that permitted certain unlawful aliens to qualify for in-state tuition rates, claiming, among other things, that the law was preempted by Section 1623 and violated their rights under the Equal Protection Clause. The student plaintiffs did not qualify for resident tuition under the challenged law or any other Kansas statute. *Id.* at 1131. The Tenth Circuit affirmed the dismissal of plaintiffs' claims on the ground that they lacked standing. *Id.* at 1139-40. The court reasoned that "[n]one of these Plaintiffs would be eligible to pay resident tuition" even if the law were struck down, because none of them had attended Kansas high schools for at least three years and graduated, as the law required. *Id.* at 1135. Thus, the plaintiffs could not establish either that they were injured by the statute or that any injuries would be redressed by a favorable decision. *Id.* at 1134-35. The court also held that because there is no private right of action to enforce Section 1623, the plaintiffs' "generalized interest in the Defendants' compliance with the law" was insufficient to establish standing. *Id.* at 1135-39.

Exactly like the plaintiffs in *Day*, Petitioners do not qualify for in-state tuition under Section 68130.5, and they paid exactly the same nonresident tuition that they would have paid, had that statute not been enacted. Petitioners therefore have not suffered any "direct, specific, and concrete injury" as required for Article III standing. *ASARCO Inc.*, 490 U.S. at 623; *see Daughtrey v. Carter*,

584 F.2d 1050, 1058 (D.C. Cir. 1978) (generalized interest in enforcement of immigration laws is an "abstract injury" insufficient for standing). Moreover, Petitioners forfeited their claims under Section 1623 and 42 U.S.C. § 1983 (Pet. App. 8), and a second state statute, Education Code Section 68130.7, prohibits the California courts from granting any money damages, tuition reimbursement, or other retroactive relief. *See* Pet. 7. As a result, there is no relief that a court could grant that would redress Petitioners' alleged injuries. The Petition therefore should be denied for lack of standing.

II. THERE IS NO CONFLICT OR OTHER GROUND WARRANTING CERTIORARI.

The California Supreme Court's unanimous decision below does not conflict with any decision of this Court or of any other court and does not present any important issue of federal law warranting certiorari. Rather, it involves nothing more than a straightforward application of well-settled canons of statutory interpretation, including the elementary principle—repeatedly recognized by this Court—that plain and unambiguous statutory language is controlling and cannot be negated by resort to legislative history.

A. No Other Court Has Addressed Whether Similar State Tuition Laws Are Preempted By Federal Law.

There is no conflict among the lower courts. As Petitioners acknowledge (Pet. 7 & n.5), ten other states currently have laws similar to California's that exempt certain nonresident students, including some unlawful

aliens, from paying in-state tuition.[8] However, to date no other court has addressed on their merits claims that such state tuition laws are preempted by the federal immigration statute at issue here, Section 1623, although such claims are pending before lower courts. As discussed above, in the only reported lower court decision, the Tenth Circuit affirmed the dismissal of a challenge to a nearly identical Kansas law on standing grounds.

Petitioners assert that the California Supreme Court's interpretation of Section 1623 conflicts with *dicta* from a single federal district court. Pet. 25-26. There is no such conflict.[9] The district court decision upon which Petitioners rely is entirely consistent with the California Supreme Court's decision. That case, *Equal Access Education v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004), rejected plaintiffs' argument that defendants' policy of denying college admission to unlawful aliens conflicted with federal law including Section 1623, which it held does not address the issue of alien access to post-secondary educational institutions. *Id.* at 604-07. The court suggested that the "more persuasive inference" to draw from Section 1623 is that "public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot

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8. *See* Nat'l Conference of State Legislatures, *Undocumented Student Tuition: State Action* (Apr. 2011), http://www.ncsl.org/default.aspx?tabid=12846 (last visited Apr. 15, 2011).

9. Even if there were, that would not constitute grounds for certiorari. This Court's Rules contemplate review of a decision by a state court of last resort only where it has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or *of a United States court of appeals*." Sup. Ct. R. 10(b) (emphasis added).

receive in-state tuition benefits unless out-of-state United States citizens receive this benefit." *Id.* at 606. That statement is entirely consistent with the decision below. *See* Pet. App. 18 ("Every nonresident who meets Section 68130.5's requirements—whether a United States citizen, a lawful alien, or an unlawful alien—is entitled to the nonresident tuition exemption").

Finally, even if there were any basis for review, the Court should deny certiorari until and unless a square conflict emerges in the lower courts. In addition to the unsuccessful challenge to the Kansas tuition statute discussed above, litigation has been filed challenging at least two similar state laws, those in Nebraska and Texas. Each of those cases raises the same preemption issue. *Immigration Reform Coal. of Texas v. State*, No. 2009-79110 (Harris C'ty, Tex., 281st Jud'cl Dist.); *Mannschreck v. Clare*, No. Ci10-8 (Dist. Ct., Jefferson C'ty, Neb.).[10]

B. There Is No Conflict Between The Decision Below and This Court's Precedents Regarding Implied Preemption.

Petitioners mistakenly contend that in conflict with precedents of this Court, the California Supreme Court "declined to address Petitioners' conflict preemption claims because it believed that conflict preemption could not occur when an express preemption clause did not

10. While the latter case has been dismissed, plaintiffs' counsel have announced that they intend to appeal from that dismissal or to ask the U.S. Department of Homeland Security to invalidate the Nebraska law. T. Ross, *Neb. College Tuition Rates Will Remain Low for Illegal Immigrants*, CHRISTIAN SCIENCE MONITOR (Dec. 17, 2010).

apply." Pet. 28-33. Petitioners claim that for the same reason, the court's decision is in tension with recent federal circuit decisions. *Id.* at 34-36. Both of those arguments are based on the same premise: that the California Supreme Court, having decided that Section 68130.5 is not expressly preempted by federal law, erroneously "refus[ed] to consider Petitioners' conflict preemption challenges." Pet. 28; *see also id.* at 29 (asserting court concluded "that it could skip over the conflict preemption issues in this case"); *id.* at 33 (court "opted not to review the conflict preemption challenges in this case").

Petitioners' key premise is inaccurate, and their claims of conflict therefore are meritless. The California Supreme Court did not "refuse" to consider Petitioners' conflict preemption claims; rather, it considered them and correctly rejected them on their merits.

Contrary to Petitioners' contention, the California Supreme Court did *not* "believe[] that conflict preemption could not occur when an express preemption clause did not apply," nor did it "ignore[] this Court's precedents." Pet. 29. Rather, the court correctly observed—citing one of the same decisions that Petitioners rely upon—that even if a state law is not expressly preempted by federal law, "Congress's intent to preempt 'may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law.'" Pet. App. 30, quoting *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). As the court also correctly acknowledged, "[t]his presents a question of Congressional purpose." *Id.*

In determining that issue, the court did not base its ruling, as Petitioners claim, on a bare "inference" that an implied preemption challenge would be automatically foreclosed. Rather, it concluded that Sections 1621 and 1623 flatly preclude any conclusion that Congress intended impliedly to preempt Section 68130.5, for the simple reason that they expressly *authorize* states to enact such laws:

> In this case, Congress did not merely imply that matters beyond the preemptive reach of the statutes are not preempted; it said so expressly. Section 1621([d]) says that a state "may" provide public benefits for unlawful aliens if it does so in compliance with the statute's requirements. This language shows that Congress did not intend to occupy the field fully. Because section 68130.5 complies with the conditions set out in both section 1621 and section 1623, those statutes cannot impliedly preempt it.

Pet. App. 31. "In short, Congress did not impliedly prohibit what it expressly permitted." *Id.* at 32.

The California Supreme Court's ruling does not conflict with any of the authorities cited in the Petition. Unlike the instant case, none of those cases involved statutory language that affirmatively authorized states to enact legislation, subject to specified conditions. Rather, each of those cases involved the interpretation of a federal statute that included both an express preemption clause and a saving clause which provided that certain state legislation or regulation would fall outside the scope of the preemption clause. Moreover, of course, none of those cases involved the same statute as that involved

here, and issues of statutory interpretation necessarily are highly dependent on the language of the particular statute involved.[11]

Thus, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), upon which Petitioners primarily rely, the Court found that even though a state tort suit fell outside the scope of an express preemption clause in a federal automotive safety statute by virtue of a saving clause in the same statute, it was nevertheless impliedly preempted because it actually conflicted with the objective of that statute and its implementing regulations. The Court held that the savings clause did not foreclose or limit the operation of ordinary conflict preemption principles, reasoning that although state-law tort actions were not expressly preempted, "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." *Id.* at 869. In contrast, this Court recently held that another similar state tort action that implicated the very same federal statute was *not* preempted because allowing it to proceed would not conflict with a significant objective of the federal regulation. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

In sharp contrast to *Geier* and other similar cases, the statute involved here directly regulates what the states may and may not do. Accordingly, there is no issue regarding the interplay between an express

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11. For that reason, Petitioners' reliance on lower court decisions involving preemption issues arising under an unrelated immigration statute, 8 U.S.C. § 1324a(h)(2), is misplaced. Pet. 34-35.

preemption clause and a savings clause. Rather, the California Supreme Court's resolution of the implied preemption question turned on its construction of the straightforward statutory language itself. By definition, state legislation such as Section 68130.5 that is authorized by Section 1621 and complies with Section 1623 cannot conflict with a significant objective of federal law, since Congress affirmatively authorized the States to enact it. Accordingly, the decision below does not conflict with *Geier* or other cases construing statutes lacking such an express provision.

C. Neither Failed Legislation Nor Speculation Regarding Future Legislation Presents Any Basis for Certiorari.

Petitioners also contend that certiorari is warranted "to prevent California and other states from taking additional steps" in purported violation of Section 1623. Pet. 26. In particular, Petitioners point to two bills passed by the California Legislature during 2010 that, they contend, would have unlawfully expanded the scope of postsecondary educational benefits available to unlawful aliens. *Id.* at 26-27. As Petitioners acknowledge, however, both bills "died without the signature" of the State's Governor. *Id.*

To state the obvious, this Court does not grant certiorari to "prevent" states from enacting legislation that a party contends *might* violate federal law, nor to decide the validity of proposed but failed legislation. "The Constitution permits this Court to decide legal questions only in the context of actual 'Cases' or 'Controversies.' U. S. Const., Art. III, §2." *Alvarez v. Smith*, 130 S. Ct. 576,

580 (2009). That fundamental jurisdictional prerequisite cannot be met by a litigant's speculation regarding legislation that *might* be enacted in the future. "A federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citations omitted); *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969).

Petitioners and their *amici* also contend because "unsuccessful efforts to repeal § 1623 have been mounted in every session of Congress since 2001," that is somehow a reason for this Court to grant review. Pet. 7-8 & n.6; Washington Legal Foundation ("WLF") Br. 15. But this Court repeatedly has warned that "'[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . . .'" *United States v. Craft*, 535 U.S. 274, 287 (2002) (citations and internal quotations omitted).

That caution is particularly appropriate here. The failed legislation referred to, the DREAM Act, would have allowed certain unlawful aliens to apply for conditional legal status and to become permanent legal residents after completing two years of college attendance or military service and meeting other requirements. That earlier versions of that proposed legislation—but *not* the version most recently rejected by Congress[12]—would have

12. S. 3992; H.R. 5281 (111th Cong., 2d Sess.).

repealed Section 1623, among numerous other objectives, provides no basis to conclude that this Court's review is required.

D. Petitioners' Position As To The Preemptive Effect Of Section 1623 Is Unsupported By The Federal Agency Charged With Enforcing That Law.

Finally, to Respondents' knowledge, no federal agency has taken any action or issued any authoritative guidance supporting Petitioners' position. That omission is significant because one of Petitioners' *amici curiae* years ago requested the U.S. Department of Homeland Security, which is primarily responsible for enforcing the nation's immigration laws (8 U.S.C. § 1103(a)(1)), to take action against other states with similar tuition legislation.[13] But as that *amicus* concedes, the federal government has not taken such enforcement action or even issued any regulations interpreting Section 1623. WLF Br. 2, 13; *see also* Pet. App. 111-12 (noting lack of any federal regulatory opinion regarding validity of state tuition laws).

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13. In 2005, *amicus curiae* Washington Legal Foundation filed formal complaints with the Department of Homeland Security arguing that the similar New York and Texas tuition laws violated Section 1623, and calling upon DHS to take enforcement action against those states. Washington Legal Foundation, *WLF Files Civil Rights Complaint Against State of Texas Regarding Benefits for Illegal Aliens* (Aug. 9, 2005), http://www.wlf.org/upload/080905RS.pdf; *WLF Files Civil Rights Complaint Against State of New York Regarding Benefits for Illegal Aliens* (Sept. 7, 2005), http://www.wlf.org/upload/090705RS.pdf.

If, as Petitioners' *amici* contend, there were truly "widespread confusion" regarding the meaning of Section 1623 (*id.* at 9),[14] surely the Executive Branch agencies responsible for the enforcement of the federal immigration laws would have acted in the fifteen years since that statute was enacted in 1996, over the course of several different Government administrations, to clear up such confusion. In the absence of such regulatory guidance, this Court should not reach out itself to decide an issue of statutory interpretation that, if there truly were any compelling need to do so, readily could be addressed either by Congressional amendment or by regulatory action.

III. THE CALIFORNIA SUPREME COURT CORRECTLY RESOLVED BOTH ISSUES.

The California Supreme Court correctly resolved Petitioners' express and implied preemption challenges to Education Code Section 68130.5. In particular, that court's interpretation of Section 1623 is entirely consistent with the plain and unambiguous language of that federal statute. In contrast, Petitioners urge an interpretation that is irreconcilable with the plain statutory text. Likewise, the court properly rejected Petitioners' implied preemption claims.

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14. *Amici* do not supply any concrete examples of such "confusion," but instead point out only that different states have enacted varying laws on the subject. WLF Br. 6-7, 11-15. Under our federal system, such variation is entirely appropriate. Indeed, it is precisely what Congress had in mind when it enacted Section 1621(d), which expressly authorizes states to enact legislation affirmatively making unlawful aliens eligible for certain benefits, but neither mandates nor prohibits such legislation. That some states have chosen to enact such legislation, while others have not, hardly establishes "confusion" warranting review by this Court.

A. The Court Correctly Construed Section 1623.

Petitioners assert that Section 1623 lends itself to two possible interpretations, only one of which is "plausible." Pet. 16. They contend that the California Supreme Court adopted the wrong interpretation, one that is unsupported by its legislative history. *Id.* at 17. However, Petitioners' argument is inconsistent with elementary principles of statutory interpretation long recognized by this Court.

1. The Court's Interpretation Is Compelled By The Plain Statutory Language.

As Petitioners acknowledge (Pet. 10), the "central issue" presented by their express preemption claim is whether Section 68130.5 makes unlawful aliens eligible for a postsecondary education benefit "on the basis of residence within a State" in violation of Section 1623. In addressing that issue, Petitioners proceed immediately to an examination of the statute's legislative history, without pausing to examine its plain language. Pet. 18-22. Petitioners' approach puts the cart of legislative history before the horse of statutory interpretation.[15]

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15. Petitioners insist that the statute's legislative history, rather than its text, is the "authoritative" source for determining Congressional intent. Pet. 20 n.10. This Court has firmly rejected that precise assertion:

> As we have repeatedly held, *the authoritative statement is the statutory text, not the legislative history* or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (emphasis added).

"We begin, as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 (2011) (citation omitted). "We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.' When the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-97 (2006) (citations omitted).

Here, as Petitioners explicitly concede, Section 1623 on it face does not constitute an absolute prohibition against states offering in-state tuition rates to unlawful aliens. Pet. 24 n.11 ("Why Congress did not simply enact a flat prohibition is unclear"). Rather, Congress enacted a *qualified* and *conditional* prohibition: it stated that an unlawful alien "shall not be eligible *on the basis of residence within a State* . . . for any postsecondary education benefit *unless* a citizen or national of the United States is eligible for such a benefit . . . without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623(a) (emphasis added).

As the California Supreme Court correctly reasoned, this language, on its face, requires a reviewing court to determine whether Section 68130.5 makes unlawful aliens eligible for the benefit of in-state tuition "on the basis of residence within a State." The court correctly concluded that it does not. Nowhere on its face does the state statute make any reference to state residence as a criterion for eligibility. Nor are the statutory criteria "proxies" or "surrogates" for residence. To the contrary, as the court correctly concluded, those criteria can be and are met by

many students who are *not* residents; thus, the exemption "cannot be deemed to be based on residence for the simple reason that many *nonresidents* may qualify for it." Pet. App. 18. In asserting that the statutory criterion requiring attendance at a California high school "effectively equates to 'residence,'" (Pet. 23-24), Petitioners ignore the court's enumeration of several categories of nonresident students who can and do qualify for the statutory exemption. Those uncontested facts are fatal to Petitioners' challenge to the court's interpretation, which is the only reading consistent with the statutory text.

2. Petitioners' Interpretation Is Inconsistent With The Statutory Text.

Petitioners inconsistently contend, relying almost exclusively on the statute's legislative history, that Section 1623 should be read as an absolute prohibition on States allowing unlawful aliens to pay in-state tuition rates at public colleges and universities. *See* Pet. 17 ("Congress intended to prevent states from providing resident tuition rates to illegal aliens"); *id.* at 20-22 ("Plainly, Congress intended to deny illegal aliens in-state tuition benefits at state colleges and universities"). As the California Supreme Court correctly concluded, however, that reading cannot be squared with the statute's plain language and structure.

As noted, Section 1623 as drafted is a *conditional* and *qualified* prohibition, not an absolute one.[16] In contrast, Petitioners would read the statute as a broad,

16. Petitioners' *amici* concede as much, admitting that that "the phrase 'on the basis of residence' somewhat narrows the scope of § 1623." WLF Br. 23.

unconditional prohibition on eligibility, *without regard to* residence. In particular, Petitioners contend that "the phrase 'on the basis of residence within a state' defines the benefit, not the criterion by which the benefit is rewarded." Pet. 17. Petitioners assert that Congress could have employed "the shorter phrase 'eligible for resident tuition rates,'" but instead "chose a phrase that conveyed the same meaning, but was more encompassing." *Id.* "In other words," Petitioners suggest, "8 U.S.C. § 1623 refers to 'residence' in defining the *benefit* because Congress was concerned about states offering illegal aliens a particular benefit – *resident* tuition rates or the functional equivalent thereof." *Id.*

Contrary to Petitioners' reading, Section 1623 focuses on an unlawful alien's *eligibility* for specified benefits. Its opening language directs that "an alien who is not lawfully present in the United States *shall not be eligible*" for certain benefits. Immediately following the word "eligible," Congress specified the "basis" on which such eligibility could not be granted: "on the basis of residence." Only after describing the eligibility limitations and after the word "for" did Congress specify the *benefit* it sought to regulate: "any postsecondary education benefit." Thus, the plain language of Section 1623 limits the bases on which states can extend eligibility, not the benefits they can grant. The statute's title supports the same conclusion: "*Limitation on eligibility* for preferential treatment of aliens not lawfully present *on basis of residence* for higher education benefits." 8 U.S.C. § 1623 (emphasis added).[17]

17. The title of a statute and the heading of a section can aid in resolving doubts about the meaning of a statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

Petitioners' strained interpretation is at odds with this straightforward and grammatically consistent reading of the statute. If Congress had meant the phrase "on the basis of residence within a State" to modify the term "postsecondary education benefit," it would have placed it immediately after that term, not after the term "eligible." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) ("a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). Instead, Petitioners would construe the statute as if it read in pertinent part,

> [A]n alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit granted on the basis of residence within a State . . . .

But this Court recently rejected a statutory interpretation that suffered from the same "patent flaw" that it was "disconnected" from the text of the statute. *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1267 (2011). There, as here, "the only way to arrive at [that interpretation] is by taking a red pen to the statute—'cutting out' some words' and 'pasting in others' until little of the actual provision remains." *Id.*

Petitioners' interpretation not only is inconsistent with the plain statutory text, it would render the phrase "on the basis of residence within a State" meaningless, in violation of the familiar canon that prohibits construing statutory language as mere surplusage. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'") (citations omitted); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448-49 (2005) (rejecting arguments that failed

to offer "any plausible alternative interpretation" of clause in preemption provision "that would give that phrase meaning"). It also would give no real meaning to the final, conditional clause of the statute, which Petitioners claim was not truly intended as a condition, but rather as a penalty that would "make it practically impossible for states to grant in-state tuition to illegal aliens." Pet. 20. *See Milner*, 131 S. Ct. at 1269 (criticizing Government's construction for "stripping the word 'personnel' of any real meaning").

3. The Statute's Sparse Legislative History Cannot Negate Its Plain Language.

As support for their proffered interpretation, Petitioners rest heavily on the statute's legislative history. Pet. 20-22. However, the California Supreme Court correctly concluded the legislative history is insufficient to overcome the statute's plain language.

The legislative history consists in its entirety of (i) a single sentence in a conference committee report on predecessor legislation; (ii) a passage in the Congressional Record reflecting remarks by a single Congressman, Rep. Cox; and (iii) two nearly identical such remarks by a second legislator, Senator Simpson. Pet. 20-22; Pet. App. 22-23. However, in sharp contrast to the conditional and qualified language of Section 1623, those brief snippets of legislative history seemingly portray the statute as an absolute, unqualified ban. They are particularly unhelpful because none of them mentions or attributes any meaning whatever to *either* of the two critical qualifying phrases: "on the basis of residence within a State," or the "unless"

clause that ends the statute. As such, they provide no useful guidance as to Congress' intent in enacting those provisions.

For these reasons, the California Supreme Court correctly concluded that the legislative history "does not reliably show that Congress intended to prohibit states entirely from exempting unlawful aliens from paying nonresident tuition." Pet. App. 22. Thus, the court correctly observed that the one-sentence summary in the conference committee report "oversimplifies more nuanced statutory language," and "cannot change the circumstance that the actual prohibition is not absolute, but qualified." *Id.* at 22, 23. *See, e.g., Shannon v. United States*, 512 U.S. 573, 583 (1994) ("We are not aware of any case . . . in which we have given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute"); *see also S&E Contractors, Inc. v. United States*, 406 U.S. 1, 14 n.9 (1972) ("In construing laws we have been extremely wary . . . of debates on the floor of Congress *save for precise analyses of statutory phrases* by the sponsors of the proposed laws") (citations omitted and emphasis added).

Likewise, the court appropriately found that floor statements by two individual legislators "carry little weight in interpreting the intent of the legislative body as a whole." *Id.* at 23. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text").

The California Supreme Court's refusal to accord dispositive significance to the legislative history, in contradiction to the plain statutory text, is entirely consistent with this Court's precedents. As the Court recently explained in rejecting the Government's similarly "text-light" approach to a statute,

> Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.

Milner, 131 S. Ct. at 1266. That "fundamental point" (*id.*) is equally persuasive here.

B. The Court Properly Rejected Petitioners' Implied Preemption Claims.

Although Petitioners base the Petition on the erroneous claim that the California Supreme Court "refused" to address their implied preemption arguments, Petitioners do not discuss those claims in detail. Instead, they summarize them in a single sentence, asserting that "Congress's statement of national immigration policy in [the PRWORA], its unmistakable intent behind 8 U.S.C. § 1623, as well as its prohibition of encouraging illegal aliens to remain in the United States, demonstrate a clear congressional objective" that Section 68130.5 "defeats." Pet. 33 (citations omitted). The California Supreme Court correctly concluded that those claims are baseless.

Section 1601(6) of the PRWORA is a general statement of Congressional policy. The operative provisions of that statute include Section 1621(d), by which Congress expressly *authorized* the States to provide public benefits to unlawful aliens. Obviously, a state law that complies with the express terms of Section 1621 cannot be impliedly preempted by a general statement of policy in the same statutory scheme. The same reasoning is dispositive of Petitioners' other claim, which is based on a federal statute that makes it a crime to knowingly or recklessly "encourage[]" or "induce[]" aliens to enter or remain in this country illegally. 8 U.S.C. § 1324(a)(1)(A)(iv). As the California Supreme Court correctly observed, "Congress did not impliedly prohibit what it expressly permitted." Pet. App. 32.

CONCLUSION

The petition for a writ of certiorari should be denied.

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ROBERT MARTINEZ, ET AL.,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

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ARGUMENT

I. Petitioners Possess Article III Standing.

Petitioners are U.S. citizen students who attend or have attended public colleges or universities in California and have been required by Respondents to pay higher, out-of-state tuition rates while illegal aliens have been afforded in-state tuition rates, in violation of 8 U.S.C. §1623. Petitioners' requested relief includes: (1) an injunction prohibiting Respondents from continuing to unlawfully charge Petitioners a higher tuition rate than that charged to certain illegal aliens, (2) reimbursement of the unlawful excess tuition they have been required to pay by Respondents, and (3) a declaration that Cal. Ed. Code §68130.5 is preempted by federal law.

Respondents argue that while Petitioners possess standing under California standing doctrine, they lack Article III standing. Respondents claim that Petitioners are not injured by the fact that illegal aliens pay lower tuition rates, and that any injury is not redressable because "[i]f the state law is invalidated . . . petitioners' tuition will remain unchanged." California Community Colleges (CCC) Br. 11; Regents Br. 18. Respondents fail to correctly describe the injuries at issue and fail to assess all of the forms of relief sought.

A. Petitioners Suffer Injury to a Legal Interest.

The primary injury-in-fact suffered by Petitioners is *an injury to a legal interest* – the legal interest created by 8 U.S.C. §1623. Specifically, it is the legal interest in receiving "any postsecondary education benefit" provided by the state's public universities and community colleges to "an alien who is not lawfully present in the United States" in "no less an amount, duration and scope." *Id.*

It is settled law that injury to a legal interest created by a federal statute is sufficient to confer Article III standing on a plaintiff: " . . . Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing. . . .'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (citations omitted). This Court has repeatedly recognized the power of Congress to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (*citing Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972), and *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968)).

The injury to the legal interest created by §1623 occurs irrespective of financial injury. Whenever an

illegal alien is offered a postsecondary education benefit and that benefit is denied to a U.S. citizen student at the state's universities, based on "whether the citizen . . . is such a resident," 8 U.S.C. §1623, the legal interest created by the federal statute has been invaded.

This injury is redressable by invalidation of the offending state statute. It matters not whether the U.S. citizen students pay in-state or out-of-state tuition rates after the invalidation of the state statute. The invasion of their legal interest under §1623 ends when the unequal treatment ends. Where disparate treatment is the cause of the injury, "the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citations and footnotes omitted); *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323, 2333 (2010); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817-18 (1989).

B. Petitioners Seek Reimbursement.

Petitioners also assert a financial injury in the form of the excess tuition charged to them, over and above the tuition charged to illegal aliens at the same institutions. Because the proceedings below never passed the demurrer stage, no court considered what forms of relief should be granted. If Petitioners prevail on their §1623 express preemption claim or their

conflict preemption claims, they will seek injunctive relief ordering Respondents to reimburse Petitioners for the excess tuition they paid.

Regents Respondents present the novel theory that Cal. Ed. Code §68130.7 – a law enacted shortly after §68130.5 to immunize California from paying damages for its violation of 8 U.S.C. §1623 – actually permits the State to violate federal law with impunity. Regents. Br. 19. Therefore, Respondents reason, since the State has declared through legislative fiat that it shall not be liable, reimbursement can never occur; thus redressability (and standing) is denied. *Id.* On its face, this argument is meritless. *See Haywood v. Drown*, 129 S.Ct. 2108, 2114 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.").[1]

C. Petitioners Do Not Present a Generalized Grievance.

Respondents also make the unsupported assertion that Petitioners present a generalized grievance "that California is not in compliance with federal law." CCC Resp. 7; Regents Resp. 16. This assertion is

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[1] Even if §68130.7 were a valid exercise of State authority, it would not negate the redressability of the denial of equal treatment guaranteed by §1623. Ending the benefit for illegal aliens would still redress the injury.

incorrect. Petitioners are U.S. citizen students who have personally been denied the in-state tuition benefits given to illegal aliens at the same state universities – a legal interest conferred on them specifically by Congress under §1623. The general public suffers no such injury. This is far from a "generalized grievance" that is "plainly undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (*quoting Ex parte Levitt*, 302 U.S. 633, 634 (1937)).

II. Petitioners Bring a Preemption Claim, and Therefore Do Not Need a Separate Private Right of Action.

Respondents argue that because Petitioners waived their argument that §1623 creates a private right of action, Petitioners may not proceed in this Court. Regents Br. 18; CCC Br. 13. However, Petitioners are asserting that §1623 *preempts* §68130.5, not that they have a private right of action to *enforce* the substantive provisions of the law.

This Court routinely reviews preemption claims without first determining whether the party has a private right of action to bring the case. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 625 (1973).

All of the circuits that have considered the issue agree that a party does not need a private right of action to bring a preemption claim. "A party may

bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2006). "In other words, a 'claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.'" *Wright Elec., Inc. v. Minn. State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003) (*quoting Burgio & Campofelice, Inc. v. New York State Dep't of Labor*, 107 F.3d 1007 (2d Cir. 1997); *see also Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 579-81 (9th Cir. 2007).

Additionally, Respondents conceded at the trial court that Petitioners do not need a private right of action to bring a preemption claim, App. 120, and did not re-raise the issue in the California Supreme Court. Having conceded the issue and waived it below, Respondents cannot now argue that Petitioners need a private right of action to bring a preemption claim. *See The Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 532 U.S. 588, 593 (2008).

Regents Respondents also misrepresent the holding of *Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 2987 (2008), a standing case concerning Kansas's law granting in-state tuition rates to illegal aliens. Respondents claim that

"'none of these [*Day*] Plaintiffs would be eligible to pay resident tuition' even if the law were struck down," and the same standing conclusion applies in this case. Regents Br. 18 (*quoting Day*, 500 F.3d at 1135). However, that holding in *Day* applied to the plaintiffs' Equal Protection Clause claim, not to their preemption claims. *See id.* at 1132-35.[2]

More importantly, reliance on the *Day* decision is problematic at best because the Tenth Circuit erred by intermixing standing and private right of action doctrines. The Tenth Circuit incorrectly made the former dependent upon the latter. "The standing question *is* whether §1623 creates a private right of action." *Day*, 500 F.3d at 1138 (emphasis added). The *Day* court then proceeded to evaluate whether §1623 conferred a private right of action on the plaintiffs, rather than whether they had standing to bring their preemption challenge under normal standing doctrine. *Id.* at 1138-39. This Court has specifically cautioned lower courts against making this error. *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) ("The Court of Appeals appeared to confuse the question of whether petitioner had standing with the

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[2] The Tenth Circuit's holding that a plaintiff lacks standing under the Equal Protection Clause when he would not otherwise qualify for the benefit conflicts with this Court's precedents holding that the remedy could simply be an end to the unequal treatment. *Heckler*, 465 U.S. at 739-40; *Levin*, 130 S.Ct. at 2333.

question of whether she had asserted a proper cause of action.").

III. Confusion Persists Among the States.

Prior to the Petition in this case, eleven states had granted in-state tuition rates to illegal aliens, in violation of §1623. Pet. 7 n.5.[3] Respondents brush aside the continuing confusion in the states as "speculation regarding future legislation." Regents Br. 25. However, it is far from speculative. In the weeks since the Petition was filed, the legislature of a twelfth state, Maryland, has passed an act affording illegal aliens in-state tuition in violation of §1623.[4]

At the same time that twelve states have defied §1623, numerous other states have rejected proposals to grant in-state tuition benefits to illegal aliens because they correctly surmised that doing so would violate federal law. *See* Ariz. Rev. Stat. 15-1803(B) ("In accordance with [§1623], a person . . . who is without lawful immigration status is not entitled to classification as an in-state student . . . "); *see also* WLF Amicus Br. 12-13. State attorneys general also have found that providing in-state tuition to illegal

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[3] Petitioners omitted the Wisconsin statute, Wis. Stat. §36.27(cr), in their Petition.

[4] Maryland SB 167. *See* Sabrina Tavernise, *Maryland: Bill Giving Tuition Breaks to Immigrants is Sent to Governor*, NY TIMES, April 13, p. A19. At this time, the governor has not yet signed it.

aliens would violate §1623. *See, e.g.*, Va. Atty. Gen'l Op. No. 06-018 (2006); *see also* WLF Amicus Br. 13.

The writ should be granted to give guidance to the state legislatures and officials that have disputed the meaning of §1623 for more than a decade, to prevent additional states from violating federal law, and to avoid needless litigation that will otherwise continue.

IV. The Lack of a Federal Regulation Reinforces Petitioners' Argument.

Regents Respondents also argue that because the Department of Homeland Security ("DHS") has not promulgated regulations interpreting §1623, certiorari is not warranted. Regents Br. 27-28. Respondents' novel theory seems to be that if there were any confusion about the meaning of the statute, then the DHS would have promulgated regulations to clarify it. *See id.*

What Respondents fail to recognize is that *the relevant agencies do not even agree* on which one of them has the authority to interpret §1623. It is a one-sentence statute that does not mention which agency is responsible for enforcing it. There are three possibilities – DHS, the Department of Justice, or the Department of Education. Respondents declare that it obviously must be DHS's job, since DHS is charged with enforcing immigration laws. Regents Br. 27. However, that is not the Justice Department's view. Recently, both the Justice Department and DHS were

asked by litigants in Nebraska to take action to enforce §1623 in their state.[5] The Department of Justice responded on April 14, 2011, *not by referring the matter to DHS, but by referring it to the Department of Education.*[6] DHS did not even respond. Similarly, as Respondents concede, DHS has not taken any action since being asked to do so by Amicus WLF in 2005. Regents Br. 27 n.13. This uncertainty among the executive branch departments regarding whose responsibility it is explains why no department has stepped forward to address the confusion among the states. For that reason, review by this Court is especially necessary.

V. The California Supreme Court Improperly Concluded that an Express Preemption Savings Clause Also Resolves any Conflict Preemption Claims.

This Court made clear in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000), that where a case presents both express preemption and implied conflict preemption challenges, and the express preemption challenge fails, that conclusion does not mean that implied conflict preemption has not occurred. A complete conflict preemption analysis must still be

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[5] Letter to Department of Justice, February 7, 2011; Letter to Department of Homeland Security, February 7, 2011 *available at* http://www.irli.org/node/35.

[6] Letter from Department of Justice, April 14, 2011 *available at* http://www.irli.org/node/35.

conducted. *See also Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543 (2008); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). This Court recently reiterated this *Geier* principle. *AT&T Mobility LLC v. Concepcion*, Slip Op. 9 (April 27, 2011).

Rather than follow this Court's *Geier* line of precedents, the California Supreme Court ignored it entirely and adopted a pre-*Geier* view that if a statute falls within an express preemption savings clause, then implied preemption cannot occur. Pet. 29-33. The court devoted four paragraphs to explaining why this must be so.[7] App. 30-32. The court concluded: "In short, Congress did not impliedly prohibit what it expressly permitted. Section 68130.5 is not impliedly preempted." App. 32.

Respondents attempt in vain to conceal the court's mistake in this regard. Regents Respondents simply declare without elaboration that "the court properly rejected Petitioners' implied preemption claims." Regents Br. 28. However, they misunderstand the problem. The problem is not that the court failed to reject the implied preemption claims. The problem is that the court rejected them *for an impermissible reason*: an implied preemption claim cannot be rejected simply because the statute in question is saved

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[7] While the court's reasoning may apply to implied field preemption, *see* App. 31-32, it does not apply to implied conflict preemption – a distinction Respondents miss.

by an express preemption savings clause. *Geier*, 529 U.S. at 869.

CCC Respondents understand the problem. However, they respond by ripping fragments from the court's decision and stitching them back together in the form of an implied preemption analysis that the court never conducted. CCC Resp. 21-24. They admit that they are doing exactly that: "Although the California Supreme Court did not explicitly label this discussion as the impossibility prong of implied preemption, it effectively disposes of that analysis." *Id.*, 23 n.8 (citing App. 18-19). Respondents grossly mischaracterize the court's decision. Nothing on pages 18-19 comes close to addressing Petitioners' conflict preemption arguments.

One of Petitioners' principal conflict preemption claims before the California Supreme Court was that §68130.5 suffers from impossibility preemption. This is because an illegal alien student must remain unlawfully present at a California university in order to take advantage of the law's valuable financial subsidy. It is therefore impossible to comply with federal law while receiving the benefit of §68130.5. Respondents' attempt to fabricate a response to this impossibility preemption argument from the court's out-of-context statements does not make sense. Respondents say that "the court also addressed how it was possible *for the State law to comply with the federal law. . . .*" CCC Resp. 22 (emphasis added). That is correct. But that has nothing to do with *whether an illegal alien can comply with federal law*

while receiving the benefit of in-state tuition rates. The court was addressing an express preemption claim under §1623, not an impossibility-of-compliance conflict preemption claim.

Petitioners' second conflict preemption claim concerned the federal crime of "encourage[ing]" or "induc[ing]" an illegal alien to "reside in the United States." 8 U.S.C. §1324(a)(1)(A)(iv). When Respondents encourage illegal aliens to seek admission by offering them in-state tuition rates, they severely undermine the enforcement of this federal law. The California Supreme Court said nothing in response to this conflict preemption claim. So too with Petitioners' claims that §68130.5 conflicts with the classifications of federal immigration law by inventing its own classifications. Instead, the court dismissed all of the implied preemption claims with the sweeping observation that "Congress did not impliedly prohibit what it expressly permitted." App. 32.

Finally, Regents Respondents oddly assert that "[t]he California Supreme Court's ruling does not conflict with any of the authorities cited in the Petition" because "none of those cases involved statutory language that affirmatively authorized states to enact legislation, subject to specified conditions. . . ." Rather, each statute contained a savings clause "provid[ing] that certain state legislation or regulation would fall outside the scope of the preemption clause." Regents Br. 23. There is no functional difference between the two. In §§1621(d) and 1623, as well as in the preemption savings clauses analyzed by this

Court, *see* Pet. 29-33, certain state activity is expressly preempted while other state activity is saved from preemption. The analysis is the same. *See Geier*, 529 U.S. at 869. Granting the writ will prevent lower courts from making this error and reviving the pre-*Geier* confusion.

CONCLUSION

For the foregoing reasons, certiorari is warranted.

Respectfully submitted,

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In the Supreme Court of the United States

ROBERT MARTINEZ, *ET AL.*,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Petitioners Robert Martinez *et al.* (collectively, "Martinez") present two questions to this Court in their challenge to the tuition charged by Respondents California Community College ("CCC"), California State University ("CSU"), and University of California (collectively, the "Universities"):

1. Whether a state statute that defies the congressional intent behind 8 U.S.C. §1623 by providing resident tuition rates at public postsecondary institutions to illegal aliens and declaring that it is granting those benefits to illegal aliens not on the basis of "residence" in the state, but on the basis of attending a high school in the state, is expressly preempted.
2. Whether a court must undertake conflict preemption analysis after concluding that an express preemption provision does not apply in a case involving both types of preemption claims.

Amicus curiae Eagle Forum Education & Legal Defense Fund respectfully submits that this Court must answer both questions in the affirmative.

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No. 10-1029

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On Petition for a Writ of Certiorari to the California Supreme Court

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit organization founded in 1981 and headquartered in Saint Louis. For thirty years, Eagle Forum has defended American sovereignty and promoted adherence to the U.S. Constitution. Eagle Forum has

[1] *Amicus* files this brief with consent by all parties, with 10 or more days' prior written notice; the parties' written letters of consent have been lodged with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the brief's preparation or submission.

repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States, and supported enforcing immigration laws. For the foregoing reasons, Eagle Forum participated as *amicus curiae* before the California Supreme Court in this litigation, and it has direct and vital interests in the issues that petitioners present to this Court.

CONSTITUTIONAL BACKGROUND

This litigation implicates the "[p]ower to regulate immigration," which "is unquestionably *exclusively* a federal power," applied in the area of post-secondary education. *DeCanas v. Bica,* 424 U.S. 351, 354 (1976) (emphasis added). "Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs." *Toll v. Moreno,* 458 U.S. 1, 10 (1982) (citations omitted). In seeking to enforce federal immigration law against state institutions, Martinez relies on two clauses of the U.S. Constitution.

Under the Supremacy Clause, federal law preempts state law whenever the two conflict. U.S. CONST. Art. VI, cl. 2. Courts have identified three ways in which the Supremacy Clause can preempt state or local laws: express preemption, "field" pre-emption, and implied or conflict pre-emption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). In determining a statute's preemptive scope, congressional intent is "the ultimate touchstone." *Wisconsin Dep't of Indus., Labor & Human Relations*

v. Gould, 475 U.S. 282, 290 (1986). Under *Santa Fe Elevator* and its progeny, however, courts often apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1, cl. 4. The Equal Protection Clause "essentially ... direct[s] that all persons similarly situated ... be treated alike," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), because – even under the rational-basis test – the "Constitution neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (interior quotations omitted). Although Martinez's equal-protection claim is not before the Court,[2] the equal-protection argument is relevant to preemption.

STATUTORY BACKGROUND

This litigation concerns the interplay between §68130.5 of California's Education Code and two sections of federal immigration law enacted in 1996, 8 U.S.C. §1621 and §1623.

§1621 and PRWORA

Enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), §1621 provides that illegal aliens are

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[2] The Universities did not appeal the Court of Appeal's remand of the Equal Protection issue.

"not eligible for any State or local public benefit," excepting certain enumerated emergency-related benefits, 8 U.S.C. §1621(a)-(b), unless §1621(d)'s exception applies. 8 U.S.C. §1621(a), (d). In pertinent part, a "State or local public benefit" includes "postsecondary education ... benefit[s]." 8 U.S.C. §1621(c). The legislative history confirms that Congress preempted all then-current benefits for illegal aliens:

> No current State law, State constitutional provision, State executive order or decision of any State or Federal court shall provide a sufficient basis for a State to be relieved of the requirement to deny benefits to illegal aliens. Laws, ordinances, or executive orders passed by county, city or other local officials will not allow those entities to provide benefits to illegal aliens.

H.R. CONF. REP. NO. 104–725, at 383 (July 30, 1996). In doing so, however, Congress allowed states to enact *new,* post-PRWORA benefits for illegal aliens under certain conditions.

Specifically, and notwithstanding §1621(a)'s express preemption of the entire field of pre-enactment benefits to illegal aliens, §1621(d) authorizes states to adopt post-PRWORA statutes that "affirmatively provide[]" such otherwise-proscribed benefits to illegal aliens:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be

> ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

8 U.S.C. §1621(d). PRWORA also provided that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6). The Conference Report explains that "it continues to be the immigration policy of the United States that noncitizens within the Nation's borders not depend on public resources," but also notes that "noncitizens ... have been applying for and receiving public benefits at increasing rates." H.R. CONF. REP. NO. 104–725, at 378. In response to that development, Congress found "that it is a compelling government interest to enact new eligibility and sponsorship rules to assure that noncitizens become self-reliant and to *remove any incentive* for illegal immigration." *Id.* (emphasis added).

§1623 and IIRIRA

Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), §1623 denies in-state postsecondary tuition to illegal aliens on the basis of residence unless non-resident U.S. citizens are eligible for the same benefit:

> *Notwithstanding any other provision of law,* an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence* within a State (or a political subdivision) for any postsecondary

> education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) *without regard to whether the citizen or national is such a resident.*

8 U.S.C. §1623 (emphasis added).

As initially approved by the Senate, §1623's precursor applied to *any benefit*, not only to postsecondary education benefits:

> BENEFITS OF RESIDENCE
> Notwithstanding any other provision of law, no State or local government entity shall consider any ineligible alien as a resident when to do so would place such alien in a more favorable position, regarding access to, or the cost of, any benefit or government service, than a United States citizen who is not regarded as such a resident.

S.1664, 104th Cong. §201(a)(2) (1996). The Committee Report explained that this section provided that "State or local governments may not treat an ineligible alien as a resident, if such action would treat the alien more favorably than a non-resident U.S. citizen." S. REP. NO. 104–249, at 22 (Apr. 10, 1996). The floor debates in both the House and Senate included un-rebutted statements from sponsors that the bill would deny in-state tuition to illegal aliens. *See* Pet. at 21.[3]

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[3] *See* 142 Cong. Rec. H11376-77 (daily ed. Sept 26, 1996) (Rep. Cox) ("[n]ow if I move from California to Indiana, I am not going to get in-State benefits

The Conference Report provides that the "House recedes to Senate amendment section 201(a)(2) with modifications" and that "[t]his section provides that illegal aliens are not eligible for in-state tuition rates at public institutions of higher education," H.R. CONF. REP. NO. 104–828, at 240 (Sept. 24, 1996), amending the section to its current form. *Id.* at 134. Although successfully reported out of conference, the bill – H.R. 2202 – was not enacted. Instead, IIRIRA subsequently was folded into an omnibus bill, reported without change, and enacted as part of that omnibus bill. *See* H.R. CONF. REP. NO. 104–863, at 688 (Sept. 28, 1996); PUB. L. NO. 104-208, §505(a), 110 Stat. 3009, 3009-672 (Sept. 30, 1996).[4]

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because I am from California, but illegal aliens, unless we pass this bill, are going to get in-State tuition. Title V says illegal aliens are not eligible for in-State tuition at public colleges, universities, technical and vocational schools"); 142 Cong. Rec. S11508 (daily ed. Sept. 27, 1996) (Sen. Simpson) ("[w]ithout the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges"); 142 Cong. Rec. S11713 (daily ed. Sept. 28, 1996) (Sen. Simpson) ("[i]llegal aliens will no longer be eligible for reduced in-State college tuition").

[4] This Court routinely relies on legislative history from predecessor bills, *Begier v. I.R.S.*, 496 U.S. 53, 66 & n.6 (1990), and has relied on IIRIRA's Conference Report. *INS v. St. Cyr*, 533 U.S. 289, 318

§68130.5 and AB 540

California precludes illegal aliens from establishing "residence" for tuition purposes. CAL. EDUC. CODE §68062(h). For non-resident U.S. citizens, California ties minors to their parents' residence, *id.* §§68061, 68062(f)-(g), and conditions adults' residence on the "union of act and intent" that they will remain in California "when not called elsewhere for labor or other special or temporary purpose," "return[ing to California] in seasons of repose." *Id.* §68062(b), (d). For U.S. citizens, California requires one year or more of California residence to qualify for "resident" tuition. *Id.* §68017.

In Assembly Bill 540 ("AB 540"), California provided in-state resident tuition to certain students not otherwise qualifying as state residents. 2001 Cal. Stat. ch.814 (enacted as CAL. EDUC. CODE §68130.5). Beyond its alien-based provisions, AB 540 poses three requirements to qualify for in-state tuition: (1) attending a California high school for at least three years; (2) graduating from a California high school or attaining the equivalent; and (3) enrolling in a covered California university or college not earlier than the fall of 2001. CAL. EDUC. CODE §68130.5(a)(1)-(3). With respect to aliens, AB 540 denies in-state tuition for any alien *lawfully* present in the United States, *id.* §68130.5(a), but allows "person[s] without lawful immigration status" (*i.e.*, illegal aliens) to qualify for in-state resident tuition

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(2001). As such, IIRIRA's Conference Report is legislative history for §1623.

by "filing of an affidavit with the [relevant school] stating that the student has filed an application to legalize his or her immigration status or will file an application as soon as he or she is eligible to do so." *Id.* §68130.5(a)(4).

California's Legislature found and declared that AB 540 "does not confer postsecondary education benefits on the basis of residence within the meaning of [8 U.S.C. §1623]." AB 540, §(a)(5). As explained in its legislative history, however, AB 540 enables qualifying nonresidents to pay the in-state "resident" tuition otherwise available only to residents: "Qualifies longterm California *residents,* as specified, regardless of citizenship status, for lower *'resident'* fee payments at the [CCC] and the [CSU]." Assembly Higher Education Committee, Concurrence in Senate Amendments of AB 540 (2001-2002 Reg. Sess.), at 1 (Sept. 7, 2001) (emphasis added) ("2001 Assembly Concurrence").

Enacted the following year, §68130.7 immunizes California schools from retroactive damage awards, further tying §68130.5 to residence in California: "Existing law qualifies specified long-term California *residents,* regardless of citizenship status, for lower *'resident'* fees at CSU and CCC." Assembly Higher Education Committee, Concurrence in Senate Amendments of AB 1543 (2001-2002 Reg. Sess.), at 1 (Jan. 24, 2002) (emphasis added) ("2002 Assembly Concurrence"). Indeed, until changing course without explanation, Governor Davis understood that a predecessor bill violated §1623. Governor's Veto

Message, AB 1197 (2001) *reprinted in* Vol. 1 Clerk's Transcript at 59-60 ("Veto Message").

STATEMENT OF FACTS

The facts are not disputed. U.S. citizens who are not California "residents" must pay out-of-state tuition at the California public universities and colleges covered by §68130.5. By contrast, illegal aliens living in California long enough to have attended and graduated from high school qualify for in-state "resident" tuition, without ever having established legal "residence" in California.

In the California Supreme Court, the University of California acknowledged that the record showed that 390 students out of the approximately 1,500 students who qualified for in-state tuition under §68130.5 were illegal aliens, making illegal aliens 26.0 percent of the benefited class. Relying on judicially noticeable data from the California Department of Finance and the federal Department of Homeland Security, Eagle Forum demonstrated that California's illegal-alien population and total population were approximately 2 million and 38 million, respectively, with illegal aliens' constituting approximately 5.26 percent of the state population.[5]

REASONS TO GRANT THE WRIT

On the merits, *amicus* Eagle Forum supports Martinez on the two questions presented (Sections III and IV, *infra*). In addition, Eagle Forum

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[5] *Amicus curiae* Eagle Forum will lodge the relevant data with the Clerk pursuant to Rule 32.3.

highlights two threshold issues (Sections I and II, *infra*) that further justify this Court's review.

I. Although the California Supreme Court did not reach the presumption against preemption, this case presents two presumption-related bases for review. First, §1621(a) cleared the field of prior state involvement, and this Court should rule on whether such legislative field-clearing provisions negate any otherwise-applicable judicial presumption against preemption. Second, this case presents an opportunity to clarify the presumption's application to federal interests (incentives for illegal aliens), not the impacted state interest (tuition or education).

II. Although the California Supreme Court did not address causes of action, this case presents questions about redressing ongoing violations of both federal laws and federal rights.

III. Until relatively recently (in 1988), 28 U.S.C. §1257 required this Court's review when a state's highest court upheld state law against charges of federal preemption. Even if no longer *required,* review here is warranted by the need to enforce federal law in an area of exclusive federal concern, the demonstrated confusion among the states, and the significant liability to schools – over $200 million *annually* in California alone – if Martinez's position eventually prevails.

IV. By ignoring conflict preemption, California has rejected not only federal law but also the Supremacy Clause itself. California's clear error – amounting to partial secession – requires this Court's review. While analytically the last point in

the argument, this point is absolutely critical to our federal system.

I. §68130.5 DOES NOT TRIGGER THE PRESUMPTION AGAINST PREEMPTION

The California Supreme Court did not rule on the "presumption against preemption," App. 13a, under which courts assume that "the historic police powers of the States [a]re not to be superseded ... unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230. Given the 1996 enactment of §1621 and §1623, however, the congressional purpose was "clear and manifest" with respect to *pre-1996* benefits for illegal aliens, leaving no viable state laws in the preempted field until California and a few other states re-entered the field, post-1996.

As this Court recently recognized, *Santa Fe Elevator* applies only if "the field which Congress is said to have pre-empted has been traditionally occupied by the States" and "not ... when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke,* 529 U.S. 89, 107-08 (2000) (interior quotations omitted); *accord Buckman Co. v. Plaintiffs' Legal Comm.,* 531 U.S. 341, 347 (2001). More recently, this Court downplayed the significance of federal presence in the field and held that the "presumption [against preemption] thus accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine,* 129 S.Ct. 1187, 1194-95 & n.3 (2009). As *Wyeth* explained, the presumption applies – even notwithstanding long-

term federal regulation – because "respect for the States as independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 129 S.Ct. at 1195 n.3 (interior quotations omitted). In other words, states must *presently occupy the field* for the presumption to apply.

In analyzing and applying the presumption against preemption, courts must first determine the field at issue. For example, *Locke* concerned the environment in the form of water quality, but analyzed the narrow *maritime-commerce* field. *Locke,* 529 U.S. at 106-07; *accord Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits," not to all tort law or to public health and safety). The inquiry focuses on the federal law, not the state law, so that a decision by Massachusetts to boycott companies that do business with Burma is preempted by U.S. foreign policy with respect to Burma sanctions, notwithstanding Massachusetts' proprietary concern with how Massachusetts spends its own money. *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions, not to states' discretion to spend state funds). Here, the preempted field is reduced in-state tuition *to illegal aliens,* within the context of the federal government's attempt to control illegal immigration. The field is not higher education generally or even tuition specifically.

In that field, §1621(a) unambiguously cleared away any pre-1996 state involvement. By contrast, *Santa Fe Elevator* cited a 1944 decision where 21 states (of 48) regulated warehouses and 47 states had adopted the Uniform Warehouse Receipts Act. *Santa Fe Elevator*, 331 U.S. at 230 (citing *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 148-49 (1944)). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation as "public utilities" without any apparent congressional consideration of the issue. *Davies Warehouse*, 321 U.S. at 148-49.

Although ten states have entered the preempted field *since* §1621's enactment, Pet. at 7 n.5, none entered the field *before* Congress enacted §1623. There is no evidence, much less compelling *Davies Warehouse* evidence, that Congress considered either §1621(d) or §1623 to involve a field that the states *already* occupied. In essence, §1621(a) eliminated all states' prior entry into the field of in-state tuition for illegal aliens by "clearly and manifestly" preempting all pre-1996 postsecondary education benefits for illegal aliens. 8 U.S.C. §1621(a). For any post-1996 state entry into the field, Congress enacted §1621(d) and §1623 to regulate prospectively in a field *not* occupied by the states. 8 U.S.C. §§1621(d), 1623. By first clearing the field, then regulating it, Congress achieved a sort of retroactivity, which "often serve[s] entirely ... legitimate purposes, [*e.g.*,] to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress

considers salutary." *Landsgraf v. USI Film Prod.*, 511 US 244, 267-68 (1994).

II. MARTINEZ CAN SUE UNDER BOTH *EX PARTE YOUNG* AND §1983

When this litigation returns to the trial court, Martinez can proceed under both 42 U.S.C. §1983 and the officer-suit fiction of *Ex parte Young*. By way of background, the Court of Appeal found that Martinez failed to preserve the issue of whether §1623 creates an enforceable private right of action, but nonetheless ordered the trial court to allow Martinez to amend the complaint with respect to equal-protection issues, *id.* 99a, and reversed dismissal with respect to Martinez's claims for preemption under §1623 and for injunctive and declaratory relief. App. 91a, 109a. The Court of Appeal did not clarify the specific bases on which the remanded aspects of this litigation would proceed, and the California Supreme Court did not address the issue.

"[T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3). *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided what now is 28 U.S.C. §1331. *Id.* Both halves of this two-pronged framework are available in state and federal courts, the former by concurrent jurisdiction, *Haywood v.*

Drown, 129 S.Ct. 2108, 2114 (2009) ("state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law"), and the latter because California courts recognize the *Ex parte Young* doctrine. *Brock v. Superior Court*, 12 Cal.2d 605, 609-10 (1939).

A. Martinez Can Sue under *Ex parte Young*

The Universities cannot contest that Martinez has a cause of action to enforce §1623's preemptive scope by enjoining the defendants' ongoing violations of federal law. *See, e.g., McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 415 (5th Cir. 2004) (it is "misleading[]" and a "misinterpretation" with "no support" to suggest that "that Plaintiffs cannot proceed under *Ex parte Young* unless this court first determines that their claims rely on federal laws that are both constitutional and enforceable against the State"); *Illinois Ass'n of Mortg. Brokers v. Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002) ("[i]t is not necessary for us to determine whether the" federal statute "create[s] rights enforceable under §1983" because a court's general jurisdiction suffices to enter injunctive relief). Thus, with or without §1983, Martinez has a cause of action for equitable and declaratory relief against any ongoing requirements to pay elevated tuition (or educational debt) to California against federal law.

B. Martinez Can Sue under §1983

Martinez also can pursue claims under §1983. Although the Universities have argued that the law-of-the-case doctrine would prevent Martinez from

pursuing preemption under §1983, "[t]he doctrine that a previous ruling has become law of the case has *no application* except as to the decisions of *appellate* Courts." *Lawrence v. Ballou*, 37 Cal. 518, 521 (1869) (emphasis added). "Under the doctrine of the law of the case, a principle or rule that a *reviewing court* states in an opinion and that is *necessary to the reviewing court's decision* must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal." *People v. Jurado*, 38 Cal.4th 72, 94 (2006) (emphasis added). Because the Court of Appeal did not reach the merits of the §1983 issue -- and the merits *a fortiori* were unnecessary to the appellate decision – no law of the case attached.

Significantly, §1983 itself preempts §68130.7's purported limit on damages: "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood*, 129 S.Ct. at 2114; *accord Manta Management Corp. v. City of San Bernardino*, 43 Cal.4th 400, 406-07 (2008). By purporting to disallow damages that §1983 allows, §68130.7 clearly constitutes a preempted "state law that is inconsistent with federal law." *Manta Management Corp.*, 43 Cal.4th at 406-07. As such, California state courts cannot enforce §68130.7 against Martinez's claims.

III. §1623 EXPRESSLY PREEMPTS §68130.5

Section 1623 unquestionably defines two non-domiciliary classes – namely, U.S. citizens attending

public universities in another state and illegal aliens who have been living in that state for several years – and requires that the former class receive in-state tuition if the latter class receives it. *See Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (*overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974)) (discussing creation of statutory classes on the basis of residence). For preemption purposes, the question is how §68130.5's two non-domiciliary classes – namely, those who attended and graduated from California high schools and those who did not – intersect with §1623's two federal classes.

To a great extent, preemption and equal protection overlap. For equal-protection purposes, the question is whether §68130.5's two non-domiciliary classes discriminate either invidiously, *see, e.g., Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-419 (1948) (citizenship or alienage); *Shapiro*, 394 U.S. at 634 (duration of living in-state); *Vlandis v. Kline*, 412 U.S. 441, 450 n.6 (1973) (right to travel), or irrationally. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319-320 (1993). As analyzed in this Section, the preemption analysis draws on equal protection analysis to determine whether §68130.5 falls within §1623's preemptive scope.

A. §1623 Alone Expressly Preempts §68130.5

The parties dispute the antecedent modified by the statutory phrase "on the basis of residence," *compare* Pet. at 16-25 *with* App. 17a-18a, without considering the breadth of that statutory phrase. But

Congress legislated here in an area of broad historical context, where the statutory "on the basis of" phrase has a "broad sweep." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174-77 (2005). In *Jackson*, the male basketball coach of a women's basketball team stated a claim for discrimination "on the basis of sex" when his school allegedly dismissed him for complaining about sex discrimination against the basketball team. This Court ruled for Mr. Jackson, despite the irrelevance of *his* sex, because Congress would have understood the on-the-basis-of phrase to cover a "sweep as broad as its language," based on prior Court rulings under 42 U.S.C. §1981. *Id.* Similarly, Congress would have understood §1623's on-the-basis-of phrase to cover a broad sweep.

In any event, California obviously has targeted illegal aliens for disparately favorable treatment, in violation of §1623. If a state "target[s]" an "activit[y]" that "happen[s] to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor [or favor] that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). In such circumstances, courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Here, the legislative history of §68130.5 and §68130.7 provide ample evidence

that California intended to treat its illegal aliens as residents,[6] contrary to letter and spirit of §1623.

As explained in the factual background, illegal aliens represented slightly more than five percent of the California's population but ended up with more than twenty-five percent of §68130.5's benefits at the University of California. Courts evaluate such discrimination using a normal distribution, and §68130.5's skewed results represent approximately 36 standard deviations from the "null hypothesis" that illegal-alien status played no part in California's statute.[7] Obviously, 36 is considerably more than two or three standard deviations needed to establish discrimination. *Castaneda v. Partida,* 430 U.S. 482, 494-96 & n.17 (1977). Under the circumstances, any court would readily find evidence that §68130.5 discriminates in favor of illegal aliens, unless *California* could demonstrate that it did not.

Particularly at the demurrer stage of litigation, courts cannot accept statutory criteria that may be surrogates or proxies for forbidden criteria:

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[6] *See* 2001 Assembly Concurrence, at 1; 2002 Assembly Concurrence, at 1; Veto Message, at 1.

[7] The Regents' 20.74% gap in the distribution of §68130.5's benefits (*i.e.*, 26.0% observed versus 5.26% expected) represents 35.97 standard deviations, $(\sqrt[2]{(.0526)(1.000-.0526)/(1500)})$, which corresponds to a probability of essentially zero that the observed 26.0% would occur by chance if §68130.5 applied neutrally, vis-à-vis illegal-alien status.

> Whether [this] should be interpreted as merely applying ... to classifications that are but proxies for differential treatment against out-of-state residents, or as prohibiting any classification with the practical effect of discriminating against such residents, is a matter we need not decide at this stage of these cases. Under either interpretation, we agree with petitioners that the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting this claim.

Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66-67 (2003). Thus, even if skeptical that Martinez will prove that California intentionally circumvented §1623 with a surrogate criterion, this Court nonetheless must allow the claim to proceed.[8]

For all the foregoing reasons, *amicus* Eagle Forum respectfully submits that §1623's prohibition of residence-based disparate treatment includes attendance-based disparate treatment.

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[8] There is no reason to be skeptical. The Court of Appeal held that California's Legislature intended attendance as a surrogate for residence, App. 78a, and the California Supreme Court essentially agreed. *Id.* 23a-24a.

B. The Statutory and Constitutional Scheme Expressly Preempt §68130.5

To avoid "untenable distinctions," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), courts must consider legislation as a whole, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986), and "interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (interior citations omitted). Thus, even assuming *arguendo* that §1621(d) generally would authorize §68130.5, the more-specific, later-enacted provision – which applies "notwithstanding any other provision of law" – nonetheless preempts §68130.5. 8 U.S.C. §1623.

Moreover, Martinez's preemption claims intersect and overlap with his equal-protection claims: "Attacks on state welfare statutes often combine Equal Protection Clause and Supremacy Clause issues." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Townsend v. Swank*, 404 U.S. 282, 283 (1971) (equal-protection and preemption argument based on Social Security Act definition of "dependent child" for student aid); *Moreno*, 458 U.S. at 11 n.16 (*citing* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060-65 (1979) *and* David F. Levi, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979)).

As Professor Perry explained, "[d]iscriminatory state action against aliens impedes implementation

of the federal policy authorizing the alien's residence in the United States," an area where the "federal government's jurisdiction ... is exclusive." Perry, *Modern Equal Protection*, 79 COLUM. L. REV. at 1063. For that reason, the "Court's practice of disfavoring state laws disadvantaging aliens is best understood and justified, therefore, in terms of the supremacy clause principle that no state may take action that would interfere with – and so is presumptively precluded by – congressional immigration policy." *Id.* The same reasoning applies here: federal immigration law has created a class (non-resident U.S. citizens) with in-state tuition rights equal to (or greater than) any such rights of illegal aliens living in a state. By discriminating *in favor of illegal aliens* against a statutory class of U.S. citizens, California violates both the Supremacy Clause and the Equal Protection Clause.

Finally, although the Universities seek cover in the California Legislature's conclusory, self-serving finding that §68103.5 complies with §1623, this Court has rejected the "aberrational doctrine" that "state legislatures [can] nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). Indeed, California's Legislature severely undercut its credibility by hedging its bets:

> If a state court finds that Section 68130.5... is unlawful, the court may order, as equitable relief, that the administering entity that is

> the subject of the lawsuit terminate any waiver awarded under that statute or provision, but no money damages, tuition refund or waiver, or any other retroactive relief, may be awarded.

CAL. EDUC. CODE §68130.7. In essence, §68130.7 acknowledges that the Universities may lose this litigation and tries to ameliorate the impact of losing.

C. The Legislative History Supports Express Preemption

Although the Universities asked the lower courts to ignore §1623's conference report, courts "look[] to legislative history and other extrinsic material when required to interpret a statute [that] is ambiguous." *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991). "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which *forbids* its use, however clear the words may appear on superficial examination." *U.S. v. American Trucking Ass'ns., Inc.*, 310 U.S. 534, 543-44 (1940) (footnote and interior quotations omitted, emphasis added). Moreover, a conference report – even one partially at odds with "[t]he statute's plain language and prior legislative history" – nonetheless is "due great weight." *National Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833 & n.28 (1983). This Court clearly *may* consult legislative history.

Given the legislative history's unanimous and unambiguous support for Martinez, this is not a case where "legislative history is itself often murky, ambiguous, and contradictory," which can degrade

into "an exercise in looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568-69 (2005) (interior quotations omitted). If there were legislative history to support the Universities, they would cite it.

IV. FEDERAL LAW IMPLIEDLY PREEMPTS §68130.5, NOTWITHSTANDING EXPRESS PREEMPTION AND SAVINGS CLAUSES

Even if neither §1623 nor §1621 *expressly* preempts §68130.5, federal immigration law nonetheless would *impliedly* preempt §68130.5 for conflicting with the "compelling ... [federal] interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6); H.R. CONF. REP. NO. 104–725, at 378. The California Supreme Court rejected conflict preemption here, based on the presence of express preemption and a savings clause, App. 30a-31a, committing clear error inconsistent with this Court's recent preemption cases. In doing so, the California Supreme Court nullified not only an act of Congress but also the Supremacy Clause itself.

Under conflict preemption, the Supremacy Clause "nullifies" both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that prevent or *frustrate* the accomplishment of a federal objective." *Geier*, 529 U.S. at 873-74 (interior quotations omitted, emphasis added); *cf. Crosby*, 530 U.S. at 373 n.6 (because "the categories of preemption are not rigidly distinct[,] ... field pre-emption may be understood as a species of conflict pre-emption")

(interior quotations omitted). Conflict preemption applies either where "significant conflict exists between an identifiable federal policy or interest and the [operation] of state law" or where "the application of state law would frustrate specific objectives of federal legislation." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507-08 (1988) (interior quotations omitted, alteration in original). To emphasize, *impossibility is not required:* Frustration suffices. *Moreno,* 458 U.S. at 16.

As Martinez explains, Pet. at 28-33, California's position ignores this Court's holding in *Geier* that conflict preemption applies, notwithstanding express preemption and savings clauses. *Geier,* 529 U.S. at 873; *Buckman,* 531 U.S. at 352. California's rejection of both federal law and the Supremacy Clause itself requires this Court's supervision.

In a dual typographical and interpretive error, the California Supreme Court cites §1621(c) as expressly allowing California to provide in-state tuition to illegal aliens. App. 31a. First, the correct citation is §1621(d). Second, §1621(d) is not a savings clause: it did not "save" existing law. Quite the contrary, §1621(a) expressly preempted *all* then-existing state laws. 8 U.S.C. §1621(a); H.R. CONF. REP. NO. 104–725, at 383. At best, §1621(d) is a safe harbor for post-enactment state laws. Moreover, for tuition, the later-enacted §1623 – like §1621(a) – applies "notwithstanding any other provision of law." 8 U.S.C. §1623. Bedrock principles of statutory construction trebly preclude §1621(d)'s limiting the

more-specific, later-enacted §1623 that applies notwithstanding §1621(d).

Significantly, the federal interests here fall in an area of exclusive federal concern:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States [and] *regulation of their conduct before naturalization[.]* Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission [and] residence of aliens in the United States or the several states.

Takahashi, 334 U.S. at 419 (citations omitted, emphasis added); *Moreno,* 458 U.S. at 10. For conflict in areas of "uniquely federal interest," the "conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption." *Boyle,* 487 U.S. at 507-08 (interior quotations omitted).

As indicated in Section I, *supra,* the field here is illegal aliens' eligibility for beneficial treatment, vis-à-vis U.S. citizens, under compelling federal interests in removing any incentives that beneficial treatment provides to illegal aliens. 8 U.S.C. §1601(6); H.R. CONF. REP. NO. 104–725, at 378. Using high school attendance in lieu of residence easily *frustrates* the federal interest. Certainly, §68130.5 frustrates that interest more than discrimination against *legal* aliens frustrated their favorable federal tax treatment in *Moreno, supra.* Even if §1623 does not *expressly* preempt California's tuition benefits for

illegal aliens, federal immigration law *impliedly* preempts §68130.5.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Dated: March 18, 2011

Respectfully submitted,

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No. 10-1029

IN THE

Supreme Court of the United States

ROBERT MARTINEZ, *et al.*,
Petitioners,

v.

REGENTS OF THE UNIVERSITY
OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To the Supreme Court of California

BRIEF OF U.S. REPS. LAMAR SMITH, JOHN CAMPBELL, ELTON GALLEGLY, STEVE KING, TOM MCCLINTOCK, SUE MYRICK, TED POE, DANA ROHRABACHER, ED ROYCE, WASHINGTON LEGAL FOUNDATION, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

A federal statute, 8 U.S.C. § 1623, prohibits a State from providing in-state college tuition rates to illegal aliens "on the basis of residence" within the State, unless the State also offers those in-state rates to all U.S. citizens. California generally reserves its lowest, in-state tuition rates for "domiciliary residents" of the State, a category that does not include any illegal aliens. Notwithstanding that general rule, a California statute, California EDUCATION CODE § 68130.5, provides that in-state tuition rates are available to anyone (including illegal aliens) who has attended a California high school for three or more years and has graduated from a California high school (or has attained the equivalent of graduation). The questions presented are as follows:

(1) Does EDUCATION CODE § 68130.5 provide preferential in-state tuition rates to illegal aliens "on the basis of residence," and is it thus preempted by 8 U.S.C. § 1623?

(2) Where the California Supreme Court determined that the purpose of EDUCATION CODE § 68130.5 was to benefit illegal aliens living within California, can California nonetheless avoid the strictures of 8 U.S.C. § 1623 by basing § 68130.5's eligibility criteria on a factor (high school attendance) that is not synonymous with "residence" but nonetheless correlates highly with "residence?"

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INTERESTS OF *AMICI CURIAE*

Reps. John Campbell (Cal.), Steve King (Iowa), Elton Gallegly (Cal.), Tom McClintock (Cal.), Sue Myrick (N.C.), Ted Poe (Tex.), Ed Royce (Cal.), Dana Rohrabacher (Cal.), and Lamar Smith (Tex.) are Members of the U.S. House of Representatives.[1] Smith is Chairman of the House Judiciary Committee. In 1996, he played a leading role in adoption of 8 U.S.C. § 1623 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546. Gallegly is Chairman of the Judiciary Committee's Subcommittee on Immigration and Enforcement, King is Vice-Chairman, and Poe is a Member of the Subcommittee.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 states, including many in California. WLF's members include United States citizens who are not California residents and who attend or are interested in attending (or whose dependent children attend or are interested in attending) public postsecondary education institutions within the State of California. WLF filed a brief in this matter when it was before the California Supreme Court.

The Allied Educational Foundation (AEF) is a

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of intent to file. All parties consent to the filing; letters of consent have been lodged with the Court.

non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that California has adopted a policy that discriminates against U.S. citizens in favor of aliens who are in this country illegally and are not domiciliary residents of California. *Amici* are also concerned that the U.S. Department of Homeland Security in not currently taking steps to enforce 8 U.S.C. § 1623, the federal statute that expressly prohibits such discrimination. In light of that inaction, *amici* believe that it is particularly important for the Court to review the decision of the California Supreme Court.

STATEMENT OF THE CASE

The petition seeks review of the California Supreme Court's decision to sustain a demurrer filed by Respondents (referred to herein collectively as "the Universities"). California courts treat a demurrer "as admitting all properly pleaded facts." *Shirk v. Vista Unified School Dist.*, 42 Cal. 4th 201, 205 (2007). Under California law, all factual allegations included in Petitioners' complaint "must [be] assume[d] to be true." *Fox v. Ethicon Endo-Surgery*, 35 Cal. 4th 797, 819 (2005); Pet. App. 8.

Institutions of higher education operated by the State of California offer reduced tuition rates to some of their students. In general, the reduced rates are

available only to those who are domiciliary residents of the State. *See, e.g.*, EDUC. CODE §§ 68040, 68050, 68052. As the Universities concede and as the California Supreme Court found, those who are physically present in California in violation of federal immigration laws (referred to herein as "illegal aliens") are not domiciliary residents of the State and thus historically have not been eligible for in-state tuition rates. Pet. App. 17 (citing EDUC. CODE § 68062).

Petitioners allege that the California legislature in 2001 adopted legislation "intended" to permit illegal aliens living within the State to enroll in California colleges and universities at in-state tuition rates, while denying those same reduced rates (in the vast majority of cases) to U.S. citizens who are not domiciliary residents of California. Complaint, ¶ 5. Petitioners allege that the legislation (codified at EDUC. CODE § 68130.5) violates 8 U.S.C. § 1623, which prohibits States from offering in-state tuition rates to illegal aliens "on the basis of residence," unless the same rates are also offered to all U.S. citizens.[2]

Petitioners are U.S. citizens who attend or have

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[2] 8 U.S.C. § 1623 provides in pertinent part:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

attended colleges or universities in California and (because they are not domiciliary residents of California) have been paying tuition at higher, out-of-state rates. Their complaint sought declaratory, injunctive, and monetary relief based on claims that § 68130.5, *inter alia*: (1) violated their rights under § 1623 (Count I); (2) violated their rights under 42 U.S.C. § 1983, which creates a federal right of action against those who, acting under color of state law, deprive another of rights protected by a federal law – in this instance § 1623 (Count III); and (3) violated their rights under federal law because § 68130.5 is preempted by § 1623 and other provisions of federal law (Count VI).

The trial court granted the Universities' demurrer with respect to all ten counts of the complaint, without leave to amend. Pet. App. 110-123. In 2008, the Court of Appeal reversed in significant part. *Id.* at 38-109. The appeals court held that Petitioners had not adequately preserved their appeal with respect to Counts I and III and on that basis upheld the demurrer as to those two counts. *Id.* at 55; Slip Op. 17-23. It held that Petitioners were nonetheless entitled to raise their § 1623 claim by means of their assertion (in Count VI) that § 68130.5 conflicted with (and thus was preempted by) § 1623 and other provisions of federal law. Pet. App. 86-91. The court reversed and remanded, stating, "[T]he demurrer was improperly sustained as to the preemption . . . claims." *Id.* at 109.

The Universities then sought (and were granted) review in the California Supreme Court. The Universities argued that the Court of Appeal had misconstrued 8 U.S.C. § 1623 and that, properly

understood, the federal statute did not preempt EDUC. CODE § 68130.5. The Universities did not assert (and thereby waived) any argument that Petitioners were not entitled under federal law to maintain a right of action based on their claim that § 1623 preempted § 68130.5. Nor did the California Supreme Court address whether Petitioners were so entitled.

In November 2010, the California Supreme Court reversed, finding *inter alia* that § 68130.5 was neither expressly nor impliedly preempted by federal law. Pet. App. 1-37. The court reasoned that although § 68130.5 granted reduced tuition rates to many illegal aliens living within California, it did so not "on the basis of residence" (within the meaning of § 1623) but rather on the basis of attendance at and graduation from California high schools. *Id.* at 17. The court said that the high-school-attendance provision should not be deemed an award of reduced tuition "on the basis of residence" because it benefitted at least some citizens who have no claim to California residency (*e.g.*, out-of-state students who attended a California boarding school). *Id.* at 18.

The court concluded that the California legislature most likely was motivated to adopt the high-school-attendance provision by a desire "to give unlawful aliens who live in California the benefit of resident tuition in a way that does not violate section 1623." *Id.* at 23. But the court deemed that motivation irrelevant in determining whether § 68130.5 conflicts with the provisions of § 1623. *Id.* at 24. It held that § 68130.5 could not be deemed to conflict with § 1623 in light of § 68130.5's reliance on a criterion (high school

attendance) that was not synonymous with residency in California. Nor should the high-school-attendance criterion be deemed a "de facto or surrogate residency requirement," the court held. *Id.* at 19-20.

REASONS FOR GRANTING THE PETITION

This case raises issues of exceptional importance. In an effort to discourage unauthorized immigration to this country, Congress has adopted legislation that severely restricts the authority of state and local governments to provide public benefits to illegal immigrants. That legislation has engendered considerable confusion, particularly in the area of higher education. Many States have interpreted federal law as prohibiting them from providing virtually any higher education benefits to illegal aliens living within their borders. Others (including California) have discerned virtually no such restrictions. The Court's guidance is desperately needed to clear up the confusion.

The principal federal statute at issue, 8 U.S.C. § 1623, prohibits a State from providing postsecondary education benefits to illegal aliens "on the basis of residence" within the State, unless the State also offers those same benefits to *all* U.S. citizens. The lower courts agreed that reduced, in-state college tuition rates constitute a "postsecondary education benefit" within the meaning of § 1623. But they disagreed as to the meaning of the phrase "on the basis of residence." The Court of Appeal unanimously concluded that California provided a benefit "on the basis of residence" when it adopted legislation that was *intended* to benefit illegal aliens living in California, regardless that its eligibility

criteria did not correlate 100% with residency within California. The California Supreme Court interpreted the phrase in a markedly different fashion. It held that a State does not provide a benefit "on the basis of residence" if its eligibility criteria are not synonymous with "residence" – even if the State adopts the criteria for the purpose of benefitting illegal aliens living within the State and even if the vast majority of those who qualify for the benefit are illegal aliens living within the State.

The California courts' conflicting interpretations of § 1623 have been replicated across the country. At least ten other States share California's understanding of § 1623 and have adopted statutes that grant reduced, in-state tuition rates to those (including illegal aliens) who have graduated from a high school within the State. Other States have rejected legislation similar to California's, with legislators often citing § 1623's restrictions as their reason for rejection. Still other States have adopted legislation explicitly barring administrators at public universities from awarding in-state tuition rates to illegal aliens, or have issued legal opinions stating that § 1623 prohibits universities from making such awards. Numerous state legislatures are actively considering, during their 2011 sessions, legislation addressing the issue. Review is warranted to provide States with desperately needed guidance regarding the meaning of § 1623's "on the basis of residence" provision.

Review is also warranted because the California Supreme Court's construction of § 1623 is so clearly incorrect. It attributed to Congress a willingness to

permit States to evade § 1623's prohibition against residency-based education benefits for illegal aliens, by the simple expedient of relying on some other criterion that correlates closely with "residence." It did so even while conceding that Petitioners "may be right" that benefitting illegal aliens "living in the state" was the legislature's "primary motivation" in enacting § 68130.5. Pet. App. 23. Moreover, the Complaint (whose allegations are accepted as true for purposes of the demurrer) alleged that that was the legislature's purpose, ¶ 5; and the Court of Appeal determined that § 68130.5 "does, and was intended to, benefit illegal aliens on the basis of residence in California." Pet. App. 85.

The California Supreme Court's construction of § 1623 conflicts sharply with this Court's approach in numerous cases raising similar issues. Where a State has been shown to have been motivated by a desire to evade a federal statutory or constitutional norm, the Court repeatedly has struck down the State's legislation – even where the legislation uses terminology that makes no direct reference to the disfavored classification. For example, the Court held that the Fifteenth Amendment prohibited use of "grandfather clauses" in connection with voter qualifications, based on findings that the clauses were designed to prevent blacks from voting – even though they made no reference to the race of voters. *Guinn v. United States*, 238 U.S. 347 (1911). More recently, the Court invoked the Fifteenth Amendment to strike down a Hawaii statute that limited voting in certain special elections to those descended from individuals who were present on the islands before 1778. *Rice v. Cayetano*, 528 U.S. 495

(2000). Although the statute made no reference to race, the Court determined that the Hawaii legislature adopted the voting criterion as a proxy for Polynesian heritage and thus deemed it a prohibited race-based criterion. The decision below – by construing § 1623 as authorizing a State to adopt legislation *intended* to extend postsecondary educational benefits to illegal aliens living in the State, so long as it employs eligibility criteria that are not *precisely* synonymous with "residence" – conflicts sharply with this Court's decisions. Review is warranted to resolve that conflict.

This case presents a particularly good vehicle for addressing the § 1623 issue. Petitioners' standing to raise their claims is not open to serious question. They are U.S. citizens who have suffered injury directly traceable to California's violation of § 1623: they have been forced to pay tuition at a rate far higher than that paid by illegal aliens who are the beneficiaries of § 68130.5. And their requested relief (reimbursement of excess tuition payments and an injunction against further inequitable tuition charges) will provide relief from their injuries. Nor does this case raise any question regarding Petitioners' right to maintain an action based on their preemption claim. Respondents waived the right to raise that objection in this Court by failing to raise it in the California Supreme Court. The only issue raised by the Petition goes to the merits of Petitioners' claim: do § 68130.5 (and similar statutes in ten other States) provide preferential in-state tuition rates to illegal aliens "on the basis of residence," within the meaning of § 1623? By answering that question, the Court will provide much needed guidance to education officials in all 50 States.

I. REVIEW IS WARRANTED TO RESOLVE WIDESPREAD CONFUSION REGARDING THE MEANING OF § 1623

Congress adopted 8 U.S.C. § 1623 in 1996 as part of a broad-ranging effort to prevent illegal immigrants from receiving public benefits – both to discourage them from remaining in the country and to eliminate incentives that might encourage further illegal immigration. *See* 8 U.S.C. § 1601(6) ("It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.") Other immigration statutes adopted in 1996 provided that illegal aliens are ineligible to receive non-emergency public benefits for which at least a portion of the funding comes from the federal government, 8 U.S.C. § 1611, and in most instances are also ineligible to receive public benefits financed exclusively by state and local governments. 8 U.S.C. § 1621.[3]

Adopted by Congress several weeks after § 1621, § 1623 imposes a further restriction on the authority of States to provide postsecondary education benefits to illegal aliens. It provides that illegal aliens are ineligible for such benefits awarded "on the basis of residence" unless all U.S. citizens (without regard to their State of residence) are afforded identical eligibility. As a practical matter, that provision means that illegal aliens are never eligible for state-funded postsecondary

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[3] Congress created a limited exception to the latter prohibition, whereby a State is permitted to declare illegal aliens eligible to receive public benefits paid for out of its own funds if, after 1996, it adopts legislation "which affirmatively provides for such eligibility." 8 U.S.C. § 1621(d).

benefits – such as reduced (*i.e.*, state-subsidized) tuition rates – awarded "on the basis of residence."[4]

States charged with administering § 1623 have ascribed widely different meanings to the phrase "on the basis of residence." California and ten other States (Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, Washington, and Wisconsin) have concluded that reduced tuition rates are not being awarded "on the basis of residence" if they are awarded on the basis of attendance at a high school in the State. While each of those States traditionally has restricted eligibility for reduced, in-state tuition rates to those who are domiciliary residents of the State (a category that does not include illegal aliens), each has adopted legislation extending eligibility for reduced tuition rates to those who have attended and/or graduated from a high school located in the State.[5]

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[4]It is uncontested that neither California nor any other State is willing to offer reduced, in-state tuition rates to *all* U.S. citizens without regard to their State of residency. As explained in the Petition, U.S. citizens from outside California pay considerably more to attend public universities in the State than do California residents. Accordingly, extending in-state tuition rates to all U.S. citizens would result in a precipitous and politically unacceptable decline in tuition revenues.

[5] While the eligibility requirements imposed by the 11 statutes are not precisely identical, California's are fairly typical. California law provides that a student (other than a "nonimmigrant alien," *e.g.*, an alien in this country on a student visa) is eligible for in-state tuition rates if he: (1) attended high school in California for three or more years: (2) graduated from a California high school or attained "the equivalent thereof"; (3) enrolled in college no earlier than the fall of 2001; and (4) (applicable to illegal aliens only) submits an affidavit promising to apply for legalized immigration

Other States have concluded that extending eligibility to illegal aliens living within the State is prohibited by § 1623 because doing so constitutes awarding an educational benefit "on the basis of residence." For example, Arizona adopted a statute in 2006 that prohibits public universities from granting reduced, in-state tuition rates to illegal aliens. Ariz. Rev. Stat. 15-1803(B). The statute states that the prohibition was adopted "in accordance with [IIRIRA]," of which § 1623 was a part. *Id.* Similarly, a 2006 Georgia statute prohibits state officials from granting illegal aliens any "state or local public benefits"[6] and explicitly requires state education officials to adopt policies to ensure compliance with, *inter alia*, 8 U.S.C. § 1623. Ga. Code Ann. 50-36-1 & (c)(7). Policies later adopted by the Board of Regents of the University System of Georgia provide that illegal aliens are not eligible for in-state tuition rates. Bd. of Regents Policy Manual §§ 4.3.4, 7.3. South Carolina in 2008 adopted a statute nearly identical to the Georgia statute, including a prohibition against granting state or local benefits to illegal aliens and an explicit reference to 8 U.S.C. § 1623. S.C. Code § 8-29-10. Colorado law, without making reference to § 1623, prohibits state officials from granting state or local benefits (including postsecondary education benefits) to illegal aliens, and requires officials to verify that the applicant is not an illegal alien

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status if he ever becomes eligible. EDUC. CODE § 68130.5. Citations to nine of the other States' statutes are set forth in the Petition, at 7 n.5. The Wisconsin statute is Wisc. Stat. § 36.27(cr).

[6] The statute incorporates the federal definition of "state or local public benefits." Federal law includes "postsecondary education benefits" within that definition. 8 U.S.C. § 1621(c)(1)(B).

before granting any such benefits. Colo. Rev. Stats. 24-76.5.

Several other States – in accordance with advice from their Attorneys General that granting in-state tuition rates to illegal aliens living in the State would violate § 1623 – prohibit such grants. *See, e.g.*, Va. Atty Gen'l Op. No. 06-018 (2006) (concluding that if Virginia were to adopt legislation granting in-state tuition rates to all (including illegal aliens) who graduate from a Virginia high school, 8 U.S.C. § 1623 would require Virginia to extend those same rates to all U.S. citizens, without regard to residence); Miss. Atty Gen'l Op. No. 2007-461 (2007) (same opinion, with respect to proposed legislation granting in-state tuition rates to all Mississippi high school graduates); Ark. Atty Gen'l Op. No. 2005-69 (2005) (similar proposed legislation in Arkansas would "run afoul" of § 1623 if a court deemed the Arkansas high school attendance requirement "a de facto residence requirement."). The Texas Attorney General stated, "This office cannot predict with certainty" whether Tex. Educ. Code Ann. §§ 54-052-54.053 (which entitle all Texas high school graduates to in-state tuition rates) violates § 1623, noting that while the California Court of Appeal had discerned a conflict between § 1623 and the analogous California statute, no Texas court had so held. Tex. Atty Gen'l Op. No. GA-732 (2009). States have been unable to look for guidance to the federal government, because it has issued no regulations interpreting § 1623. Nor can they look to a body of case law for guidance: the only two courts that have rendered opinions regarding the meaning of § 1623 are the courts below, and they

reached diametrically opposed results.[7] If the Court does not grant review here, it is unlikely to have another opportunity to resolve the widespread confusion regarding the meaning of § 1623 – *amici* are unaware of other similar cases likely to come before the Court in the foreseeable future.

In the meantime, state legislatures across the country continue to debate whether to grant reduced, in-state tuition rates to illegal immigrants living in the State, with much of the debate focusing on whether such grants run afoul of § 1623. Maryland, Oregon, and Rhode Island are considering legislation that would make illegal aliens eligible for in-state tuition rates. *See*, Shanker Vedantam, "Md. Senate Weighs Bill to Give In-State Tuition to Undocumented Immigrants," *Washington Post* at B1 (Mar. 10, 2011)("Giving undocumented immigrants in-state tuition benefits at Maryland colleges would violate federal law, . . . state legislators opposed to the measure said Wednesday."); Peter Wong, "Immigrant Education Bill Gains Support," *Oregon Statesman Journal* (Feb. 15, 2011); Karen Lee Ziner, "R.I. Bill Would Grant Illegal Immigrants In-state Tuition," *Providence Journal* (Feb. 16, 2011). Conversely, legislators in Nebraska, Oklahoma, and Texas are considering bills to repeal their current tuition-break statutes. *See* Stacy Teicher Khadaroo, "Tuition Breaks for Illegal Immigrants?," *Christian Science Monitor* (Jan. 28, 2011) ("States that

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[7] A § 1623 challenge to Kansas's tuition policy reached the Tenth Circuit several years ago. The court dismissed the case for lack of standing, without ever addressing the merits. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), *cert denied*, 554 U.S. 918 (2009).

have passed tuition-benefits laws say they are based on high school attendance or graduation, not residence. Opponents of such laws say that's a de facto form of residency and therefore violate the federal law."); Kyle Daly, "Texas Republicans Look to Repeal State DREAM Act," *Texas Independent* (Mar. 7, 2011).

Moreover, as Petitioners point out, Pet. App. 7-8 & n.6, unsuccessful efforts to repeal § 1623 have been mounted in every session of Congress since 2001.[8] The fact that immigration-rights supporters have been pushing so hard for repeal is a good indication of widespread uncertainty regarding the meaning of § 1623. If, as the Universities contend, a State can evade the restrictions of § 1623 by the simple expedient of basing eligibility on high school attendance within the State, there would be little reason to push for repeal, since as so construed the statute presents no impediment to educators wishing to provide reduced tuition rates to illegal aliens. Accordingly, the persistence of DREAM Act supporters is a strong indication that they harbor serious doubts regarding whether § 68130.5 and similar state statutes conflict with § 1623.

In sum, review is warranted to resolve the widespread confusion, particularly among state officials, regarding the meaning of § 1623. They are in desperate need of guidance regarding the extent to which § 1623

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[8] Proponents of repeal have dubbed their legislation the DREAM ("Development, Relief, and Education for Alien Minors") Act. In 2010, it was passed by the House of Representatives but died in the U.S. Senate. *See* DREAM Act of 2010, S. 3827 (111th Congress).

restricts their authority to establish tuition rates at public colleges and universities.

II. THE CALIFORNIA SUPREME COURT'S INTERPRETATION OF § 1623 IS CLEARLY WRONG AND ATTRIBUTES TO CONGRESS AN INTENT TO PERMIT STATES TO ROUTINELY EVADE THE STATUTE'S RESTRICTIONS

Review is also warranted because the California Supreme Court's interpretation of § 1623 is so clearly wrong. Its interpretation attributes to Congress an intent to permit States to routinely evade congressional restrictions on the provision of postsecondary education benefits to illegal aliens. Nothing in either the text or legislative history of § 1623 supports a conclusion that Congress intended such a toothless statute.

A. Section 68130.5 Conflicts with § 1623 Because It Provides Preferential Treatment to Illegal Aliens "On the Basis of Residence"

EDUC. CODE § 68130.5(a) provides that an individual enrolled at a California college or university is entitled to in-state tuition rates, notwithstanding that the individual is not a domiciliary resident of California, if he or she meets four criteria set forth in the statute (and listed at Note 5, *supra*). The statute's disparate impact on U.S. citizens living outside California is self-evident. The vast majority of nonresident U.S. citizens do not attend or graduate from a California high school and thus do not qualify for reduced tuition. On the other

hand, virtually all college-bound illegal aliens who have been physically present in California during their teenage years do qualify because they have attended and graduated from a California high school.[9] Accordingly, in determining whether § 68130.5 violates the mandate of § 1623, the central question is whether § 68130.5's discrimination in favor of illegal aliens constitutes discrimination "on the basis of residence." Moreover, as the Court of Appeal stated, "[T]he question is whether the statute confers a benefit on the basis of residence, not whether the statute admits such a benefit is being conferred." Pet. App. 71.

Section 68130.5 imposes four conditions that must be met before someone who is not a domiciliary resident of California can quality for tuition at in-state rates. But the only substantial requirement is the first one: enrollment for at least three years in a California high school.[10] One would be hard-pressed to come up

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[9] Which groups benefit the most from § 68130.5 is a factual issue disputed by the parties. Figures cited in the court below by Respondent CCC indicate that more than 90% of students eligible to benefit from § 68130.5 are illegal aliens who live in California. CCC Opening Br. at 11-12. For purposes of the Petition (which comes to the Court from a decision sustaining Respondents' demurrer to the complaint), Petitioners' allegation that the overwhelming percentage of those benefitted by § 68130.5 are illegal aliens must be accepted as true. The Court of Appeal also construed the complaint as alleging that "the vast majority of students attending California high schools for three years live in California." Pet. App. 77.

[10] Section 68130.5 also requires those seeking in-state rates: (1) to enroll in an institution of higher learning not earlier than the fall of 2001; and (2) if the student is an illegal alien, to submit an

with a better proxy for California residency (in the sense of physical presence within the State) than attendance at a California high school for three years. There undoubtedly are some individuals who meet the high school attendance requirement but who have never lived in California (e.g., students living in an adjoining State who paid to be permitted to attend a California high school). Conversely, there may also be a few individuals seeking to enroll in a California college who are physically present in the State but do not qualify as domiciliary residents and who did not attend a California high school (*e.g.*, illegal aliens who moved to California after having attended high school elsewhere). But as the Court of Appeal concluded, it is "reasonable" to conclude that the set of college-bound individuals who attended a California high school (but are not California domiciliaries) correlates very closely with the set of college-bound individuals who have been living in California (but are not California domiciliaries). *Id.* at 73.

Moreover, that very close correlation is not happenstance. As the California Supreme Court conceded, Petitioners "may be right" that benefitting

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affidavit promising to apply for legalized status if the student ever becomes eligible for such status. As the appeals court concluded, "[T]hese supposed requirements add nothing." *Id.* at 72. Enrollment is necessarily a prerequisite to having to pay tuition at all, and the affidavit is "an empty, unenforceable promise contingent upon some future eligibility that may or may not ever occur." *Id.* A third condition – obtaining a California high school diploma or its equivalent – adds little, because students generally are not eligible to enroll in college until they have acquired a high school diploma. *Id.*

illegal aliens "living in the state" was the legislature's "primary motivation" in enacting § 68130.5. *Id.* at 23. Furthermore, the Complaint alleges that that was the legislature's purpose, ¶ 5; and the Court of Appeal determined that § 68130.5 "does, and was intended to, benefit illegal aliens on the basis of residence in California." Pet. App. 85.

This Court's case law provides no support for the California Supreme Court's conclusion that Congress did not intend § 1623 to apply to state tuition policies that do not overtly rely on residency but instead reference factors highly correlated with residency. The Court's treatment of "grandfather clauses" is illustrative. Following the Civil War and the adoption of the Fifteenth Amendment, southern States adopted a series of measures designed to prevent blacks from voting. Among such measures were strict literacy tests that few could pass; but the literacy tests invariably included a "grandfather clause" designed to ensure that whites who could not pass would still be permitted to vote. For example, Oklahoma adopted a strict literacy test in 1910, but added the following provision: "[N]o person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote" because of failure to pass the literacy test. Okla. Const., art. 3 (1910 Amendment).

In response to a challenge to the provision, Oklahoma insisted that it did not violate the Fifteenth Amendment because the provision contained no language purporting to limit the right to vote on the

basis of "race, color, or previous condition of servitude." U.S. Const., Amend. xv, § 1. The Court unanimously rejected that argument in light of evidence that the provision rested "upon no discernable reason other than the purpose to disregard the provisions of the [Fifteenth] Amendment." *Guinn v. United States*, 238 U.S. 347, 363 (1915). Similarly, there is no reason to conclude that § 1623 distinguishes between, on the one hand, States that explicitly declare an intent to benefit illegal aliens living therein and, on the other hand, States like California that harbor such an intent but find a way to effectuate their intent through reliance on a different factor that correlates very closely with residence.[11]

More recently, the Court invoked the Fifteenth Amendment to strike down a Hawaii statute that limited voting in certain special elections to those descended from individuals who were present on the islands before 1778, even though no language in the statute purported to limit voting on the basis of race. *Rice v. Cayetano*, 528 U.S. 495 (2000). The Court determined that the Hawaii legislature adopted the voting criterion as a proxy for Polynesian heritage and thus deemed it a prohibited race-based criterion. *Id.* at 515. The Court rejected Hawaii's argument that the

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[11] *Guinn* did not attach any significance to the less-than-100% correlation between the Oklahoma provision and a ban on voting by blacks (*e.g.*, a few blacks could qualify under the "grandfather clause" because they could demonstrate that at least one direct ancestor was entitled to vote in 1866). For similar reasons, it is immaterial to Petitioners' claims that a handful of nonresident U.S. citizens can qualify for in-state tuition rates under § 68130.5.

statute could not be deemed race-based because a handful of Polynesians living in Hawaii were ineligible to vote (their ancestors had migrated to Hawaii from other Pacific islands *after* 1778), explaining, "Simply because a class defined by ancestry does not include all members of the race, does not suffice to make it race neutral." *Id.* at 516-17. Just as "[a]ncestry can be a proxy for race," *id.* at 514, so too enrollment in a California high school can be a proxy for residence/physical presence in California.

B. § 68130.5 Is Preempted by § 1623

In the event of a conflict between California law and federal law, the Supremacy Clause of the U.S. Constitution, Art. vi, cl.2, mandates that federal law must prevail. Given that (as demonstrated above) § 68130.5 adopts a policy that conflicts with the federal policy established by § 1623, § 68130.5 is preempted by § 1623.

Petitioners assert that § 68130.5 is not only *impliedly* preempted (because it conflicts with § 1623) but also *expressly* preempted by § 1623. The California Supreme Court held that § 68130.5 was not expressly preempted by § 1623, and then declined to consider whether it was impliedly preempted – reasoning that when express preemption language in a federal statute does not prohibit a State's challenged conduct, it is inappropriate to consider whether preemption can be inferred from other language in the statute. Pet. App. 30-32. As Petitioners point out, that holding directly conflicts with several decisions of this Court. Pet. 28-33 (citing, *inter alia, Freightliners Corp. v. Myrick*, 514

U.S. 280 288-89 (1994)).

Moreover, the court's holding was particularly unwarranted given that the implied preemption argument is actually considerably stronger than the express preemption argument. Indeed, the Court of Appeal relied exclusively on an implied conflict preemption argument to reinstate Petitioners' claims under Count VI. Pet. App. 86-91. Section 1623 does not employ language that *expressly* bars any conduct by States. Rather, § 1623 focuses on the "eligib[ility]" of illegal aliens to receive postsecondary educational benefits from a State; it declares illegal aliens ineligible to receive reduced tuition rates "on the basis of residence." The Court of Appeal reasoned that any state policy that declares illegal aliens eligible to receive reduced tuition rates on the basis of residence is *impliedly* preempted because it conflicts with § 1623. *Id.* The absence of federal statutory language *expressly* prohibiting States from adopting such a policy somewhat weakens Petitioners' express preemption claim. But at the same time, the absence of such language renders nonsensical the California Supreme Court's rationale for refusing to consider Petitioners' implied conflict preemption claim. The court was unjustified in concluding that Congress intended an express preemption clause to set forth the entirety of its preemptive intent, given that the court never even identified an express preemption clause.

Because § 68130.5 authorizes granting in-state tuition rates to illegal aliens "on the basis of residence," it conflicts with (and therefore is impliedly preempted by) § 1623. California may offer the same low tuition

rate to *all* (citizens, resident aliens, and illegal aliens alike) or it may return to its former practice and limit in-state tuition rates to U.S. citizens and resident aliens who are domiciliary residents of California. But § 1623 prevents California from doing as it does now – favoring illegal aliens "who live in California" over non-resident U.S. citizens on the basis of residence.

Amici recognize that the phrase "on the basis of residence" somewhat narrows the scope of § 1623. In adopting the statute, Congress did not intend to limit illegal aliens' eligibility for *all* postsecondary education benefits, but only for those benefits granted "on the basis of residence." Thus, for example, § 1623 does not limit UCLA's authority to award a football scholarship to an illegal alien on the basis of athletic prowess.[12] But given the implausibility of interpreting § 68130.5 as anything other than an effort to render illegal aliens living in California eligible for in-state tuition rates "on the basis of residence," it conflicts with (and thus is impliedly preempted by) § 1623.

In sum, review is also warranted because the judgment below is based on an implausible interpretation of an important federal statute, one arrived at using interpretative methods that conflict sharply with those routinely employed by this Court in prior cases.

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[12] Awarding football scholarships to illegal aliens would, of course, still be subject to the limitations imposed by 8 U.S.C. § 1621.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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